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IN THE

Supreme Court of the United States

October Term, 1959

No. ~~587~~ 12

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,

Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD,

Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A: OPINIONS BELOW

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11850

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA, PETITIONER

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, RESPONDENT

On Petition for Review of Order of the Subversive Activities Control Board

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Decided December 23, 1954

Mr. Vito Marcantonio (who died subsequent to the argument), *Mr. John J. Abt*, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, and *Mr. Joseph Forer* for petitioner.

Miss Beatrice Rosenberg, Attorney, Department of Justice, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, *Mr. George R. Gallagher*, General Counsel, Subversive Activities Control Board, and *Mr. David B. Irons*, of the bar of the Supreme Court of Texas, *pro hac vice*, by special leave of Court, with whom *Mr. Frank R. Hunter, Jr.*, Assistant General Counsel, Subversive Activities Control Board, *Messrs. Harold D. Koffsky* and *Carl H. Imlay*, Attorneys, Department of Justice, and *Messrs. Leo M. Pellerzi* and *Ned O. Heinish*, Attorneys, Subversive Activities Control Board, were on the brief, for respondent. *Mr. William A. Paisley*, Attorney, Department of Justice, entered an appearance for respondent.

Before PRETTYMAN, BAZELON and DANAHER, Circuit Judges.

PRETTYMAN, *Circuit Judge:* This is a petition to review an order of the Subversive Activities Control Board, which holds that petitioner is a Communist-action organization within the meaning of the Subversive Activities Control Act of 1950[1] (Section 3)[2] and as such must register pursuant to the provisions of that Act.[3] The proceeding before the Board was initiated by a petition filed by the Attorney General. Testimony was received by a panel of the Board, the Attorney General presenting twenty-two witnesses and the Party-respondent three witnesses. Documentary evidence was introduced, briefs, proposed findings, and reply briefs were filed, and oral argument was heard. The panel issued a recommended decision, and exceptions to it were filed. Oral argument was had before the full Board, and the Board issued a report and the order here under review.

Petitioner's attack is in three parts, one on the Act itself, one on the order of the Board, and the third on "other reversible errors". In Part One of petitioner's brief the Act is asserted to be invalid upon four grounds. These are: The Act is an outlawry statute, designed to outlaw the Communist Party by legislative fiat; the Act violates the due process clause and is also a bill of attainder; the Act violates the constitutional prohibition against compulso · self-incrimination; and the Act violates the First Amendment. In Part Two of the brief the order of the Board is said to be invalid upon three grounds. The first ground is that the Board so applied the pro-

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[1] This Act is Title I of the Internal Security Act of 1950, 64 STAT. 987 *et seq.*

[2] 64 STAT. 989, 50 U.S.C.A. § 782.

[3] 64 STAT. 993, 50 U.S.C.A. § 786.

visions of Section 13(e)[4] of the Act as to magnify their irrationality. The second ground is that the Board violated the First Amendment. The third ground is that the Board members were subjected to extra-legal pressures and were biased. Part Three of the brief presents six additional assertedly reversible errors. They are: (1) The order is based upon conduct prior to the Act; (2) the Board's findings as to petitioner's pre-Act conduct are based upon incompetent and discredited evidence; (3) the findings with reference to the world Communist movement are not supported by evidence; (4) the findings with reference to the facts are not supported by a preponderance of the evidence; (5) the order must be set aside if it is invalid upon any ground; and (6) the appointments to the Board were made in violation of the Constitution.

We shall not follow petitioner's arrangement of its contentions, but in the course of our consideration we will deal with them all. Because this is a case of first impression, involving a new statute of importance, and because the points of both law and fact are many and vigorously pressed, our discussion will be at some length.

We look first at the statute. It opens with findings of the existence and the nature of "a world Communist movement" in a long recitation of fifteen paragraphs dealing with the nature of the movement abroad and in the United States. The Act defines a Communist-action organization. It declares certain actions to be unlawful. These actions are three in number: (1) for any person to agree with another person to contribute to the establishment in this country of a totalitarian dictatorship controlled by a foreign organization (except by constitutional amendment); (2) for an officer or employee of the United States to communicate to any agent of a foreign government or of any Communist organization any in-

[4] 64 STAT. 999, 50 U.S.C.A. § 792(e).

formation classified as affecting the security of this country; and (3) for any foreign or Communist agent to receive such information. The next two sections of the Act contain certain prohibitions directed to members of organizations registered under the Act. Then the Act requires the registration of Communist-action and Communist-front organizations, annual reports from such organizations, and registration of members of Communist-action organizations. It provides that the Attorney General keep public registers of Communist organizations. The Act prohibits certain privileges to registered organizations. It establishes the Board and provides for proceedings before it. It delineates a series of considerations which must be made by the Board. It provides for judicial review. Penalties for violation of the Act are provided. A series of amendments to other statutes, such as the Nationality Act of 1940 and the Alien Registration Act of 1940, are made. The last section of the Act is a separability provision.

I

We reject the Government's contention that we must consider the statute as a registration measure only. The argument is that: The several statutory provisions are separable; the Board's power is to require registration and no more; its order does no more than that; therefore the statute and the order must be treated by us as involving registration and no more. It is true that the provisions of this statute are separable. The Act contains a separability section[5] reading:

> "SEC. 32. If any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remaining provisions of this title, or the application of such provision to other persons or circumstances, shall not be affected thereby."

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[5] Sec. 32, 64 STAT. 1019.

And so, if one provision of this Act is invalid, its fall would not necessarily drag down the remainder of the Act; all other provisions would remain unaffected. But that is not the point of the Government's contention. The Government contends that each provision,[6] even if all are valid, must be treated separately from the others, as though each were an independent enactment unrelated to the others. The question whether one section of a statute can stand when other sections are invalid, and the question whether one valid section of a statute can be treated separately and independently of all other valid sections, are two different questions. The former would raise a separability question. The latter is governed by the elementary rule that a statute must be considered as a whole, in its entirety, all parts together.[7] The Government's argument is, in effect, that this statute is not an integrated unit but is a collection of separate measures. But we think this is not that sort of statute. The mandatory provisions, called "sanctions" in this litigation, in Sections 5, 6, 10 and 11,[8] are attached directly to registration. For example, if an organization is registered, or ordered to register, its mail must be marked and its broadcasts identified. We cannot strip the registration of its attachments. We cannot consider the registration requirement as though it were

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[6] The Government agrees that the disclosure of information required by Section 7(d) may well be considered with the registration requirement.

[7] CRAWFORD, STATUTORY CONSTRUCTION § 165 (1940); cases collected and cited at 50 AM. JUR., Statutes § 352.

[8] "Sanctions" were also imposed by Sections 22 and 25 upon alien members of a registered organization, but those sections have been superseded by the Immigration and Nationality Act of June 27, 1952, 66 STAT. 163, 8 U.S.C.A. §§ 1182, 1251, 1424, 1451.

bare, when it is not bare either in the statute or in factual consequences.

The Government relies upon *Electric Bond Co. v. Comm'n.*[9] That case involved the validity of those sections of the Utility Holding Company Act which required registration. It was urged that those sections and various other control provisions were an integrated whole and had to be considered together, as though interdependent one upon the other. The Supreme Court held that both the structure of the Act and the intent of Congress were clear that each provision had a purpose and effect of its own, that the provisions constituted groups of regulations, and that as a practical matter they could be sustained and enforced separately. It held that the statute was not an integrated unit. We think the statute now before us is an integrated unit, although invalid sections may be excised. We must treat the registration requirement as though it involves the sanctions in Sections 5, 6, 10 and 11.[10]

We later point out that Section 8, providing for registration by individual members of an organization, is not attached to organization registration but on the contrary applies when the organization does not register. We think it a separate measure from organization registration.

In the disposition of the problems presented to us we will follow the course indicated by the foregoing. We will consider the so-called "sanction" and other provisions which depend upon or flow from registration of the organization. In so far as such sections are valid we will treat them as integrated with the registration requirement and thus involved in the order before us. In so far as any of such provisions are invalid they may

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[9] 303 U.S. 419, 82 L.Ed. 936, 58 S.Ct. 678 (1938).

[10] See note 8, *supra*.

be excised, being severable, and the valid remainder will constitute the integrated unit. We will lay aside consideration of provisions which do not depend upon organization registration but are in lieu of or take effect in the absence of such registration. Factual bases for consideration of such sections are not before us.

We also quickly dispose of contentions by petitioner that the statutory procedures, as procedures, are inadequate or otherwise invalid. Full administrative hearing (Section 13), full findings (Section 13), and full judicial review (Section 14) are provided. There is no insufficiency in this respect so far as the statute is concerned.

II

The basic provision of the statute, as it concerns the present litigation, is that a Communist-action organization must register with the Attorney General. Such an organization is defined by the statute [11] as follows:

> "(3) The term 'Communist-action organization' means—
>
> "(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; and
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> "(b) any section, branch, fraction, or cell of any organization defined in subparagraph (a) of this paragraph which has not complied with the registration requirements of this title."

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[11] Sec. 3, 64 STAT. 989, 50 U.S.C.A. § 782.

Congress defined "the world Communist movement" in several paragraphs in Section 2 of the statute. It is enough for our purposes to quote paragraph (1):

> "(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization."

For the purpose of testing the validity of the statute itself, as a statute, we must assume that the conditions with which it purports to deal actually exist. The question upon validity is: If the conditions recited in the statute as necessary requisites for action under the statute do actually exist, is the statutory plan for dealing with them valid? The question whether a certain organization is subject to the statute is a different and separate question.

We turn first to the general power of government in the premises. Antipathy to domination or control by a foreign government, or even to interference on the part of a foreign government, is a basic policy in this nation. It was one of the compelling reasons for the making of the Constitution in replacement of the Confederation. Frequent references were made to it in the Constitutional Convention. Mr. Madison went all the way back to the intrigues practiced among the Amphictionic Confederates by the kings of Persia as a citation of the danger of foreign interference.[12] It was the premise of the action of the Government, through President Wash-

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[12] 1 FARRAND, RECORDS OF THE FEDERAL CONVENTION 319 (1911).

ington, in respect to Citizen Genet. It ran through the War of 1812 and the Monroe Doctrine, the fight over the League of Nations, and down to such qualms as there are concerning the United Nations. This country has always unequivocally repudiated any action which has seemed to contain the element of foreign control over our governmental affairs. To declare unconstitutional a statute which would require the registration of an organization, substantially directed, dominated or controlled by a foreign government or by an organization such as the world Communist movement defined in this statute, would be to deny one of the purposes and one of the best-established policies of the government which was created by the Constitution. This is true whether or not the foreign government is coupled with a particular movement.

Self-preservation is a high prerogative of any sovereignty. "Security against foreign danger is one of the primitive objects of civil society," wrote James Madison in the Fortieth *Federalist* paper. And he continued, "It is an avowed and essential object of the American Union." It seems to us that, however high in priority the right of self-preservation is among the prerogatives of sovereign powers in general, it is peculiarly so in respect to the Federal Government presently established in this country. As we conceive the matter, the government established by our Constitution is an instrument for service, particularly for the protection of the security of the people whose servant it is; it is a working tool the value of which lies in its usefulness. It was established by the people themselves; it did not arise of its own accord; it was not imposed from without. Since it was created by the people for the security of the people, especially against foreign encroachment, it has supreme duties both to protect its own existence and to insure that unidentified efforts on behalf of foreign agencies devoted to its disestablishment do not occur. It seems clear beyond question that, if the conditions

described in this statute do actually exist, the presently existing Federal Government has power to prohibit within its borders activity of the sort described; *a fortiori* it has power to require identification of such activities and to impose conditions short of proscription. If there is a world movement for the destruction of all presently existing national governments and for the establishment of a world dictatorship under Communist auspices, and if a given organization in this country is actually under the control of the leaders of that movement and is acting to achieve its objectives, we perceive no reason why the presently existing government in this country should not prohibit the unidentified activity of such an organization or withdraw from its members protections and privileges otherwise afforded by that government. We perceive no basic reason why that government must stand helpless before activities such as those described in this statute.

III

We come next to the place of the First Amendment in our problem. The initial inquiry is a general question whether the subject matter of the statute is such that impingement upon First Amendment rights may be imposed. If the answer to that query be affirmative, the next inquiry is a specific question whether the restrictions imposed by the statute are reasonably calculated to effectuate the remedial purposes being sought and so are valid although impingements upon the protected rights. We discuss this latter question later in this opinion.

We make the same assumption here that we made in *Barsky* v. *United States*.[13] We assume, without deciding, that this statute will interfere with freedoms of speech

[13] 83 U.S. App. D.C. 127, 167 F.2d 241 (D.C.Cir. 1948), *cert. denied*, 334 U.S. 843, 92 L.Ed. 1767, 68 S.Ct. 1511 (1948).

and assembly. It does not interfere in terms, but we think a realistic view must be taken of restrictions on First Amendment freedoms, and realistically the registration and sanction provisions will erect restrictions upon what otherwise might be a wider latitude of expression. The problem is whether the restrictions imposed are valid in this situation.

In the Party's argument an effort is made to cast the entire controversy over Communism into the form of an ideological or philosophical difference of opinion. It is true that there are such differences of opinion in respect to Communism, and controversy does rage in ideological and philosophical circles. But the problem before us deals with government, and government has intensely practical as well as theoretical aspects. Its aspects may be freely discussed in philosophical dissertations, but in the field of action a government must be realistic and factual. The right to free expression ceases at the point where it leads to harm to the Government. The epigram which has become classic as a designation of that point is "clear and present danger". When danger to government is clear and present, the right of unrestricted speech gives way as do the other basic rights of liberty and life. The "clear" in that epigram is not limited to a threat indubitably etched in every microscopic detail. It includes that which is not speculative but real, not imagined but actual. The "present" in the epigram is not restricted to the climactically imminent. It includes that which exists as contrasted with that which does not yet exist and that which has ceased to exist.

The activities of a world Communist movement such as that described in this statute and of organizations in this country devoted to its objectives constitute a clear and present danger within the meaning of any definition of the point at which freedom of speech gives way to the requirements of government security. The basic

theory of Communism that all presently existing nationalist governments be superseded by a stateless world organization under a proletarian dictatorship, the domination of one world power with all its assets by the Communists, the succession of national capitulations to the forces of that group, and the declared intentions of its leaders in respect to the remainder of the world, are reflected in the recitations in this statute and, moreover, are historic facts which cannot be disputed. We cannot at the present time treat the program and policies of the world Communist movement as a dialectic debate.

A few references will support the proposition. In the *Dennis* case [14] the Supreme Court considered the statute (known as the Smith Act) in which Congress made it unlawful for any person knowingly or wilfully to advocate, etc., the desirability, etc., of overthrowing any government in the United States by force or violence or to organize any society of persons who teach such overthrow. Holding that the power of Congress to protect the Government is beyond question, the Court said: "The question with which we are concerned here is not whether Congress has such *power*, but whether the *means* which it has employed conflict with the First and Fifth Amendments to the Constitution." [15] It held that the Government need not wait "until the putsch is about to be executed"; [16] that, if the Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.

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[14] Dennis v. United States, 341 U.S. 494, 95 L.Ed. 1137, 71 S.Ct. 857 (1951).

[15] *Id.*, 341 U.S. at 501.

[16] *Id.* at 509.

An attempt to overthrow the Government by force, the Court held, even though doomed from the outset, is a sufficient evil for Congress to prevent, and a conspiracy to advocate, as distinguished from the advocacy itself, can be constitutionally restrained, because the existence of the conspiracy creates the danger.

Moreover, the right to unimpeded expression of views does not apply to unimpeded conduct. That the protection which surrounds speech does not encompass action is well established. *Thomas* v. *Collins* [17] is a sufficient citation. Thomas had been committed for contempt for violating an order of a Texas court. Texas by statute required labor union organizers to secure organizers' cards before soliciting members. A mass meeting had been arranged in a campaign to organize employees at a plant near Houston. Thomas was to address the meeting. He was served with an order of the court, which mentioned the prospective speech and enjoined him from soliciting memberships without an organizer's card. The Supreme Court held that "a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment." [18] But the Court went on to say:

> "Once the speaker goes further, however, and engages in conduct which amounts to more than the right of free discussion comprehends, as when he undertakes the collection of funds or securing subscriptions, he enters a realm where a reasonable

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[17] 323 U.S. 516, 89 L.Ed. 430, 65 S.Ct. 315 (1945).

[18] *Id.*, 323 U.S. at 540.

registration or identification requirement may be imposed." [19]

If the mere solicitation of funds for a lawful cause is sufficient conduct to validate the restrictive police power of a state, operation to achieve the objectives of a movement such as this statute describes is conduct sufficient to invoke federal regulatory power.

Clearly the aim of the statute before us is at action and conduct rather than at mere speech and assembly. A purpose to establish a totalitarian dictatorship, posited in paragraph (1) of Section 2 of the Act,[20] is itself a program of action rather than of mere discussion. Surely no one can be naive enough to believe that such a cataclysmic change in the system of government in this country could be accomplished without action as distinguished from words. And the terms used in paragraph (1) of Section 2 to describe the means adopted by the world Communist movement—infiltration into other groups, espionage, sabotage, terrorism—are terms of action. It is a program of action; it involves the Government. It can be met with action by the Government.

The opinions in *American Communications Ass'n* v. *Douds* [21] are pertinent. That case concerned paragraph 9(h) of the National Labor Relations Act as amended,[22] which denied the privileges of the National Labor Relations Board to labor organizations unless each officer filed an affidavit that he was not a member of the Com-

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[19] *Ibid.* To the same effect are Breard v. Alexandria, 341 U.S. 622, 641 *et seq.*, 95 L.Ed. 1233, 71 S.Ct. 920 (1951), and Giboney v. Empire Storage Co., 336 U.S. 490, 93 L.Ed. 834, 69 S.Ct. 684 (1949).

[20] Quoted *supra*.

[21] 339 U.S. 382, 94 L.Ed. 925, 70 S.Ct. 674 (1950).

[22] 61 STAT. 146 (1947), 29 U.S.C.A. § 159(h).

munist Party. Sustaining the constitutionality of the provision, the Supreme Court held, *inter alia*, that Congress has power to protect interstate commerce; that Congress had before it a mass of material which tended to show that Communists had infiltrated union organizations to make them a device by which commerce might be disrupted; that the remedy provided bore a reasonable relation to the evil which the statute was designed to reach; that Congress might reasonably find that Communists, unlike members of other political parties, represent a continuing danger of disruptive political strikes; that Congress, not the courts, is primarily charged with the determination of the need for regulation of activities affecting interstate commerce; that the legislative judgment that interstate commerce must be protected from a continuing threat of unlawful strikes is a permissible one; that the Act does not suppress belief nor prohibit those who hold beliefs from engaging in any above-board activity; and that the answer to the implication that if the statute were upheld the power of government over beliefs would be as unlimited as its power over conduct, is that that result does not follow "while this Court sits". The concurring opinions throw much light upon the problem.

It seems clear to us that, if Congress, in order to protect interstate commerce, can validly deny the privileges of union office to members of the Communist Party because of the program of that Party, it can, in order to protect the Government itself, impose restrictions upon adherents of a world Communist movement such as that described in this statute.

So we are of opinion that the field in which this statute lies is one in which Congress can impose restrictions upon First Amendment rights, and that the specific evil at which the statute is aimed is one which justifies remedial steps even though such steps are restrictions upon those rights. There remains the question whether

the statutory restrictions go beyond the bounds permitted to remedies for the evil here under attack. We postpone that discussion for the moment. See VI hereinafter.

IV

Our next consideration is the protection of the Fifth Amendment. Two clauses are involved in the argument—the protections against being compelled to be a witness against oneself and against being deprived of liberty or property without due process of law.

It is said that the revelation of the membership list, required upon registration, would tend to incriminate the members under the Smith Act,[23] and that the revelation would therefore be in violation of the privilege against self-incrimination. But the membership records of an organization are not protected by the privilege. If a grand jury subpoenaed the membership roll of the Party, the custodian of the list, whether or not he was an officer or member, would be compelled to produce. This is made amply clear by *United States* v. *White*.[24] In that case a grand jury had subpoenaed an official of a labor union to produce certain union records. He declined upon the ground that they might tend to incriminate the union or himself as an officer or individually. He based his claim upon a statute which made it a crime to induce any person employed in certain work to "kickback" part of his compensation. The Supreme Court held that the privilege did not apply. It held, first, that the privilege is essentially a personal one, applying to natural individuals only. It then held that the papers which the privilege protects must be the private property of the person claiming the privilege, or at

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[23] Blau v. United States, 340 U.S. 159, 95 L.Ed. 170, 71 S.Ct. 223 (1950).

[24] 322 U.S. 694, 88 L.Ed. 1542, 64 S.Ct. 1248 (1944).

least in his possession in a purely personal capacity, and that individuals acting as representatives of a collective group are not exercising personal rights. The Court said it was unnecessary to determine whether the official was or was not a member of the union, because in any event he could not invoke the privilege. The decision and the opinion apply to the present case. If labor union records are not subject to the privilege in order to protect union members from criminal prosecution, the records of a Communist-action organization, as that term is defined in Section 3 of this statute, are not within the protection. The records of a political party are more "impersonal" than are the records of a labor union.

That the records of the Communist Party are covered by the ruling in the *White* case is established by *Rogers* v. *United States*.[25]

The Party argues that the registration provisions of the statute before us do not call for the production of books or records but require the preparation and submission of a registration statement. That statement must contain (Section 7(d)) the name and address of the organization, the names and last-known addresses of the officers and members, an accounting of moneys received and expended, and, in the cases of officers and members who are known by more than one name, such other names. The Party says that such a statement is protected by the privilege even though books and records are not. But membership lists and accountings for money furnished by an organization are reproductions of or extracts from organization records. And if the records can be compelled oral testimony "auxiliary to the production" can be compelled.[26] Whether such rec-

[25] 340 U.S. 367, 95 L.Ed. 344, 71 S.Ct. 438 (1951).

[26] United States v. Field, 193 F.2d 92 (2d Cir. 1951), *cert. dismissed*, 342 U.S. 908, 96 L.Ed. 679, 72 S.Ct. 303 (1952).

ords are kept formally or informally is immaterial. No additional explanatory testimony is required by this statute.

Moreover Congress could require Communist-action organizations to keep membership lists and accounting records. The opinion in *Bryant* v. *Zimmerman*[27] establishes that proposition. The provisions of this statute in effect make such a requirement. The Government requires many organizations to keep records. For example, it required all business houses to keep price records when prices were under Government control. To say that a Communist-action organization, as that term is defined in this statute, could not be required to keep records of its membership and its moneys is wholly untenable in our view. If these are matters of which organization records could be required, they fall squarely within the rule in the *White* case, *supra*.[28] As to a registration statement we think the *White* case applies.

Under the *White* case no privilege exists as to organization records—even for the individual who produces and signs them. But, even if the *White* case did not apply, the privilege would protect only the person called upon to sign or swear to the statement, and would protect him only in so far as his own name was involved. The privilege would not protect all members against one person's swearing that they are members, or protect one person against swearing that persons other than himself are members.[29]

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[27] 278 U.S. 63, 72, 73 L.Ed. 184, 49 S.Ct. 61 (1928). And see Shapiro v. United States, 335 U.S. 1, 92 L.Ed. 1787, 68 S.Ct. 1375 (1948), and cases there cited.

[28] Wilson v. United States, 221 U.S. 361, 55 L.Ed. 771, 31 S.Ct. 538 (1911). See discussion at 68 HARV. L. REV. 340 (1954).

[29] It might be urged that even if a person has no privilege against revealing his own membership he has a privilege against revealing the names of other members, since the

We assume for a moment, *arguendo*, that the *White* case does not apply here. We have, then, the problem of the individual who is required to sign the organization registration statement as an executive official of the Party. See Section 7(h) of the statute. By that act alone, even if he were to omit his own name from the list, he would be admitting that he is a member and an officer of the Party. We must make definite the question here posed. It is whether an order directing an organization to register is invalid because the officer who would be required to sign the registration statement would thereby be admitting a membership which might be a basis for a prosecution against him.

The statute provides (Section 4(f)) that the fact of a registration cannot be admitted in evidence in any criminal proceeding and that mere membership in a registered organization is not a violation of any criminal statute. No person called upon to sign is in danger of a prosecution which depends upon the bare fact of registration. So the protection here discussed is against the fringe effects (*e.g.*, a lead to evidence of some offense not premised upon mere membership) of signing the statement.

Several considerations are pertinent. In the first place the privilege against self-incrimination is a privilege which must be explicitly claimed. This rule has been firmly established.[30] We are urged to create an exception of law for the present case, but we see no justification for doing so. Then, since the privilege

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latter revelation might involve him in a conspiracy charge. The contrary was established by *Rogers* v. *United States*, *supra*.

[30] United States v. Monia, 317 U.S. 424, 427, 87 L.Ed. 376, 63 S.Ct. 407 (1943); Rogers v. United States, *supra*, 340 U.S. at 370; United States v. Murdock, 284 U.S. 141, 148, 76 L.Ed. 210, 52 S.Ct. 63 (1931).

must be claimed in order to bring it into play, it is by no means inevitable that a conflict would ensue between this order for registration and the privilege clause. We do not know as of now that the executive officers of the Party would claim the privilege; they might not. The only incriminatory results flowing from the act of signing would be corollaries to the fact of membership in the Party. This record shows that the Chairman and the Executive Secretary of the Party have never attempted to conceal their membership or their places of leadership. On the contrary they have proclaimed it often and publicly, both in writing and in speaking. We have no basis for assuming that they would claim protection against a mere revelation of their membership.

It is suggested to us that a statute or administrative order which places an individual in a position where he must claim his privilege in order to avoid incriminating himself is invalid. It is said claiming the privilege is incriminatory and so to force a person to claim the privilege is to force him to incriminate himself. We think the suggestion is not sound. One does not admit guilt by claiming the privilege; he merely says that an answer would tend to incriminate him, which means that it might involve him in a criminal proceeding.[31] Moreover, if the suggestion were good law many avenues of legitimate inquiry would be shut off. For example, the statutes imposing punishment for refusal to answer questions would be invalid, because they compel people to claim the privilege.

In the second place it is by no means certain that all the executive officers of our petitioner Party have any privilege in respect to the fact of their membership in

[31] This is the tenor of federal cases from United States v. Burr, 25 Fed. Cas. 38, No. 14,692e (C.C.Va. 1807), down to Hoffman v. United States, 341 U.S. 479, 95 L.Ed. 1118, 71 S.Ct. 814 (1951).

the Party. The precise provision of the Constitution is that no person shall be compelled to be a witness against himself in a criminal proceeding.[32] Practical considerations, obvious on the face of things, caused the courts to extend that language from its literal content to cover any compulsion to speak where the result would tend to incriminate. But an essential element in the latter doctrine is that the spoken matter would reveal or disclose something, or supply a needed confirmation of something suspected or only partly known. This is a note clearly struck in the cases dealing with the subject.[33] The Supreme Court said in the *Rogers* case:[34] "Since the privilege against self-incrimination presupposes a real danger of legal detriment arising from the disclosure, petitioner cannot invoke the privilege where response to the specific question in issue here would not further incriminate her."

The constitutional provision is not an empty legalism. It is a realistic barrier between the obligation of a citizen to give evidence and the injustice of inquisition by force. It was designed to achieve a precious protection. But, when it has no factual purpose under given circumstances, no reason exists for its application. If a required word does not in fact tend to incriminate the compelled witness, to interpose the barrier to the other

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[32] See Huard, *The Fifth Amendment—An Evaluation*, 42 GEO. L.J. 345 (1954).

[33] Hoffman v. United States, 341 U.S. 479, 95 L.Ed. 1118, 71 S.Ct. 814 (1951); Mason v. United States, 244 U.S. 362, 61 L.Ed. 1198, 37 S.Ct. 621 (1917); Heike v. United States, 227 U.S. 131, 143-4, 57 L.Ed. 450, 33 S.Ct. 226 (1913); Brown v. Walker, 161 U.S. 591, 600, 40 L.Ed. 819, 16 S.Ct. 644 (1896); United States v. Burr, 25 Fed. Cas. 38, No. 14,692e (C.C.Va. 1807); *Ex parte* Irvine, 74 Fed. 954 (C.C.S.D.Ohio 1896).

[34] *Supra*, 340 U.S. at 372-3.

wise proper process of the law would be to make a mockery of a valued instrument. We turn to the facts before us. Some of these executive officials have been convicted and have served their sentences under the Smith Act, because they organized the Party.[35] Some of them, as we have said, have many times in public print and places asserted membership in the Party. Two members of the National Committee of the Party came forward voluntarily and testified in the proceeding at bar, stating that they are members. In no event could one of these persons be compelled to take the stand as a witness against himself in a criminal case; but in a non-criminal proceeding could he be required to state something which would not in actual fact be a valuable link in a prosecution against him? We do not decide the point, but we note in connection with the suggestion now under discussion that another revelation of the membership in the Party of some of its executive officials may not constitute any real danger of legal detriment to them or tend further to incriminate them. Those officials of the Party may not now have a privilege in respect to their Party membership.

In the next place we do not know and cannot assume what the Attorney General might do under the new Immunity Statute[36] if an executive officer of an organization called upon to sign an organization registration statement had a valid right to the privilege and claimed it. Under that statute the courts have broad powers to grant immunity, upon application of the Attorney General, in proceedings before them involving violations of the statute here involved. We do not decide the

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[35] United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494, 95 L.Ed. 1137, 71 S.Ct. 857 (1951).

[36] 18 U.S.C. § 3486(c), Pub. L. No. 600, 83d Cong., 2d Sess. (Aug. 20, 1954).

validity or meaning of the Immunity Statute, but we note the possibility that under this new act a person under compulsion to sign a statement which would tend to incriminate him might be granted immunity from prosecution.

In the next place, even if the suggestion under discussion were true, *i.e.*, even if one or all executive officials of an organization validly invoked the privilege, so that no one could be compelled to sign the registration, the utmost result would be that the statute and order would be unenforceable. We think they could not be held to be invalid merely because they might conceivably be unenforceable in a given case. The problem of the practicality of enforcement arises when enforcement efforts are made.

The foregoing considerations lead us to a clear conclusion upon the point. We have before us an order addressed to an organization as such; it is not addressed to any individual. We conclude that neither the statute nor the order requiring an organization to register can be held invalid because of the possibility that the person or persons required to sign on behalf of the organization might be called upon to claim a privilege against self-incrimination, or that such a claim if made would be sustained, or that an application for immunity would not be made or would not be validly granted, or that the statute or order might not be enforceable.

Boyd v. *United States*[37] is urged upon us as contrary to the foregoing views. But we do not so read that case. In the first place it dealt with personal, private papers, and the Court made that fact a key to the decision. The production of private papers and the production of organization papers "differ *toto coelo*", the Court said. In later cases the Court has emphasized

[37] 116 U.S. 616, 29 L.Ed. 746, 6 S.Ct. 524 (1886). For a discussion of the *Boyd* case see 8 WIGMORE, EVIDENCE § 2184 (3d ed. 1940).

that feature of the *Boyd* case.[38] In the second place the statute in that case authorized the compulsory production directly for use in a forfeiture case under a criminal statute. In the case before us, as we have sufficiently noted, the revealed membership is not *per se* a violation of any criminal statute, and the fact of the registration cannot be shown in evidence in any criminal case. We think the *Boyd* case is not in point here.

The information required on a registration statement as to members with more than one name poses a slightly different problem. In so far as the other names appear on organization records, they are covered by the foregoing. In so far as they are names of persons other than the person signing the statement, they have no privilege in his hands. Whether an individual known by several names, and called upon to sign or swear to a registration statement, is privileged to refuse to reveal his own other names is not before us; decision upon it must await the happening and a claim of the privilege.

United States v. *Daisart Sportswear*,[39] relied on by the Party, does not apply to the problem before us. It concerned the one individual who testified under compulsion and who claimed immunity.

The Party says the requirement of Section 8 of the statute that an individual member register himself as a member violates the protection against self-incrimination and so invalidates the statute. This section provides that

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[38] Wilson v. United States, *supra* note 28, 221 U.S. at 377; Essgee Co. v. United States, 262 U.S. 151, 158, 67 L.Ed. 917, 43 S.Ct. 514 (1923); Nathanson v. United States, 290 U.S. 41, 47, 78 L.Ed. 159, 54 S.Ct. 11 (1933); United States v. White, *supra*, 322 U.S. at 699; Shapiro v. United States, 335 U.S. 1, 33, 92 L.Ed. 1787, 68 S.Ct. 1375 (1948).

[39] 169 F.2d 856 (2d Cir. 1948), *rev'd on other grounds sub nom.* Smith v. United States, 337 U.S. 137, 93 L.Ed. 1264, 69 S.Ct. 1000 (1949).

an individual member must register himself as a member if an organization finally ordered to register fails to do so, or if upon registering and filing its membership list the organization fails to include the member's name. The section operates when an organization does not register or fails to register accurately. It is an alternate, rather than an attachment, to the registration of the organization. As such it poses a separate and independent problem from that posed by the requirement for organization registration. To reach the problem posed under Section 8 we would have to assume that the Party will not register if it is finally ordered to do so, or that if it registers its membership list will be incomplete. But we cannot make such assumptions. An opinion based upon them would be merely an advisory opinion, which we have no power to render. We have before us only an order requiring the organization to register. Section 8 is separable; if it were held to be invalid its fall would not affect organization registration; it is not before us; its validity is not involved in the order here under review. We do not consider any problems which might be posed by it.

V

The due process of law clause is the basis for two contentions by the Party. The first is that the application of the sanctions to members of a registered organization deprives those members of rights and privileges solely because of their membership in an organization, and that this violates due process. The second contention is that the statute violates procedural due process.

We come first to the sanctions imposed upon members respecting Government and defense facility employment (Section 5(a)(1)) and applications for passports (Section 6). One must note that the condition upon which these sanctions apply is membership; it is not a mere listing as a member in a registration statement. One of

the two provisions refers to "any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final"; the other section contains similar language. Membership in an organization is of course a fact, and if one is actually a member he knows it. The statute before us requires that before these sanctions apply a member must have "knowledge or notice" that the organization has registered or been finally ordered to register. If the organization has registered as a Communist-action organization without an order to do so, it has voluntarily agreed that it is such an organization. If a final order has been entered against it, its nature as such an organization has been determined by full administrative proceedings, fully reviewed by the courts. So notice or knowledge of registration carries knowledge or notice of the nature of the organization; its nature has been either admitted or established. The statute provides for notice to every listed member of a registered organization, and it is to that notice that the statute here refers. If a member has either notice of the registration or knowledge of it through some other means, the sanctions apply to him. Thus there are three requisites for application of the sanctions to members: (1) The person must be a member; (2) the organization must be registered or finally ordered to register; and (3) the person must have knowledge or notice of the registration or order.

There is no novelty in the application of civil prohibitions to members of organizations. For example, an officer, director or employee of a stock investment house cannot be an officer, director or employee of any Federal reserve bank;[40] and a member of one political party cannot become a member of the Federal Communications

[40] 48 STAT. 194 (1933), as amended, 12 U.S.C.A. § 78.

Commission if a majority of that Commission are already members of that party.[41]

That a sanction may be imposed upon members of an organization which advocates the overthrow of the Government by force is established by *Adler* v. *Board of Education*[42] and *Wieman* v. *Updegraff*.[43] In the *Adler* case the Supreme Court held:

> "Membership in a listed organization found to be within the statute and known by the member to be within the statute is a legislative finding that the member by his membership supports the thing the organization stands for, namely, the overthrow of government by unlawful means. We cannot say that such a finding is contrary to fact or that 'generality of experience' points to a different conclusion. Disqualification follows therefore as a reasonable presumption from such membership and support." [44]

In the *Wieman* case an Oklahoma statute required state employees to take an oath that the affiant was not affiliated with any agency, etc., officially determined by the United States Attorney General to be a subversive organization. The Supreme Court held the statute invalid. The Court distinguished *Garner* v. *Los Angeles Board*,[45] the *Adler* case, and *Gerende* v. *Election Board*,[46] on the grounds that in each of those cases knowledge on the part of the employee was implicitly or explicitly required. In *Wieman* the Court found that the oath would exclude persons solely on the basis of organizational

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[41] 48 STAT. 1066 (1934), as amended, 47 U.S.C.A. § 154.

[42] 342 U.S. 485, 96 L.Ed. 517, 72 S.Ct. 380 (1952).

[43] 344 U.S. 183, 97 L.Ed. 216, 73 S.Ct. 215 (1952).

[44] *Supra*, 342 U.S. at 494-5.

[45] 341 U.S. 716, 95 L.Ed. 1317, 71 S.Ct. 909 (1951).

[46] 341 U.S. 56, 95 L.Ed. 745, 71 S.Ct. 565 (1951).

membership regardless of their knowledge concerning the organization. It said: "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." [47]

In *Bryant* v. *Zimmerman, supra,* the Supreme Court upheld the validity of a requirement that certain organizations report their membership lists against an attack based upon the due process clause. The discussion is apt here.

We think the requirement in this statute that a member have knowledge or notice of the registration of the organization, which means that he has knowledge or notice of the nature of the organization, before these sanctions apply to him, satisfies the due process clause so that sanctions could be premised upon membership under the doctrine of the *Adler* and similar cases.

A special argument is made by the Party in respect to the denial of passports by Government officers under Section 6(b). That section provides that officials shall not issue a passport to an individual if they know the individual is a member of a registered Communist-action organization or if they have reason to believe the individual is a member of such an organization. The latter clause gives rise to the problem. Under it an official may deny the passport if he merely "ha[s] reason to believe". If that provision is valid, knowledge on the part of the individual as to the nature of the organization to which he is supposed to belong would not be a requisite for denial of the passport. We do not pass upon the point, because such a situation is not before us; it does not depend upon registration but upon considerations not necessarily even factual. The provision is severable.

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[47] *Supra,* 344 U.S. at 191.

In this part of its argument the Party groups with the sanctions just discussed the penalty provided by Section 15(a)(2) for individuals who fail to comply wi an individual's obligation to register. But such a penalty does not flow from organization registration; it is an alternate provision, not before us. We do not consider it. We postpone to Part VI of this opinion consideration of the provisions relating to aliens and denaturalization.

We have next the question of procedural due process of law. This general question involves several specific questions. Is procedural due process of law afforded: (1) An organization from which registration is demanded? (2) An organization faced with sanctions to be imposed upon it because it is registered? (3) An individual listed, or proposed to be listed, as a member of a registered organization? (4) An individual threatened with sanctions because of membership in a registered organization? (5) An individual threatened with criminal prosecution by reason of membership in a Communist-action organization?

We have already noted that the provision for the registration of an organization, which involves a determination of its nature, complies with procedural due process. In so far as sanctions—identification of mail and broadcasts and denial of tax benefits—imposed upon an organization, registered or ordered to register, are concerned, the due process afforded by the procedure required for compulsory registration constitutes due process as to the results inherent in the registration and applicable to the registering organization as an organization. In so far as the listing of a name of an individual is concerned, the statute contains detailed provisions whereby one who has been listed erroneously or who leaves the organization can secure the removal of his name from the list before the list is made public. It provides for an individual notice of a listing (Section 7(g)), an application to the Attorney General (Section

13(b)), an appeal to the Subversive Activities Control Board (Section 7(g) and Section 13(b)), and review by the courts (Section 14). In so far as the rights of a person who denies the fact of membership are concerned, not only the foregoing procedure in respect to the listing but all other procedures ordinarily open to a person asserting such a denial are left open in this statute." This statute does not negate any procedural rights otherwise available to a person entering upon a factual controversy. We do not attempt to determine here the validity of the administrative procedures ordinarily open to Government employees and to applicants for passports. This statute leaves all such procedures available for the determination of a disputed claim that a person is a member of a registered organization. Neither the Lloyd-LaFollette Act,[49] which protects Government employees, nor the Secretary of State's procedural passport regulations[50] are repealed or amended by this Act. This statute itself imposes no restriction upon procedural due process. Whether some other statute or regulation does so is not now before us. Moreover the courts are open

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[48] The Act as originally passed provided (Sections 5(c) and 6(c)) that a person who is listed on a membership list in a registration statement and who inaugurates a contest against such listing should not be deemed to be a member of an organization for purposes of the sanctions during the period of the contest and until he has lost and his name has been published as a member. Those provisions were repealed by Section 7(c) of the Communist Control Act of 1954, 68 STAT. 775, 778, and so one who is a member is subject to the sanctions without the interval of immunity. But the presence of such an immunity period is not a due process requirement. Due process is afforded if a person has full opportunity to get off a list and full opportunity to prove he is not a member if he is asserted to be one and thus liable to sanctions or penalties.

[49] 37 STAT. 555 (1912), as amended, 5 U.S.C.A. § 652.

[50] 22 CODE FED. REGS. Part 51.

for an ousted Government employee,[51] and would be open to a person denied a passport under the requirement of this statute. The reviewability of the State Department's denial of a passport in ordinary cases is a disputed question [52] because of the official discretion involved. The statute before us neither adds to nor detracts from that general reviewability. But certainly, so far as a denial might be premised upon a mandatory requirement of this statute, *e.g.*, Section 6, the courts would be open for review of the action under the statute. In so far as due process is required preliminary to any damage or inconvenience caused by the publication of a listing of a person's name as a member, the statute protects him from publicity until he has exhausted the process, already described, available to test the presence of his name on the list. In so far as criminal prosecutions are concerned, the statute (Section 4(f)) provides: "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of • • • any • • • criminal statute. The fact of the registration of any person • • • as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution • • • for any alleged violation of any • • • criminal statute."

Thus it seems to us that procedural due process is afforded in each of the several situations presented to us for consideration in this respect.

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[51] See Roth v. Brownell, 93 U.S. App. D.C. —, 215 F.2d 500 (D.C.Cir. 1954), *cert. denied*, 23 U.S.L. WEEK 3108 (U.S. Oct. 25, 1954).

[52] Note, *Passports and Freedom of Travel: The Conflict of a Right and a Privilege*, 41 GEO. L.J. 63 (1952); Comment, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 YALE L.J. 171 (1952).

VI

We come now to examine severally, in respects not already discussed, the restrictions (or so-called "sanctions") imposed by the statute upon registered organizations and their members. This includes the question whether each sanction is reasonably related to the substantive evil at which Congress was aiming, a pertinent inquiry under the First Amendment. See III hereinabove.

When a Communist-action organization is registered the following consequences ensue: (1) No member with knowledge or notice of the registration can have non-elective Government employment or employment in a defense facility (Section 5); (2) no member can obtain a passport (Section 6); (3) organization mail and broadcasts must be identified as originating with a Communist organization (Section 10); (4) alien members are excludable, deportable, and ineligible for naturalization (Sections 22 and 25);[53] (5) tax deductions and exemptions are withdrawn (Section 11); and (6) certain members are subject to denaturalization (Section 25).[54]

Preliminarily we note that the requirement for registration in and of itself presents no difficulty. It is no more than we customarily require of many organizations, such as lobbyists[55] and foreign agents,[56] and even of doctors, lawyers, restaurants and barbers, who are required

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[53] Carried forward in Sections 212(a)(28)(E), 241(a)(6)(E), and 313(a)(2)(G) of the Immigration and Nationality Act of June 27, 1952, 66 STAT. 185, 205, 240, 8 U.S.C.A. §§ 1182(a)(28)(E), 1251(a)(6)(E), 1424(a)(2)(G).

[54] Carried forward in Section 340(c) of the Immigration and Nationality Act of June 27, 1952, 66 STAT. 261, 8 U.S.C.A. § 1451(c).

[55] 60 STAT. 841 (1946), 2 U.S.C.A. § 267. See United States v. Harriss, 347 U.S. 612, 98 L.Ed. —, 74 S.Ct. 808 (1954).

[56] 52 STAT. 632 (1938), as amended, 22 U.S.C.A. § 612.

to register and obtain licenses. The requirement for an accounting of moneys received and expended is no more than is required of any political party,[57] and since petitioner claims to be a political party we see no invalidity in the application to it of such a requirement. The requirement that a political organization and its members is similar to the customary requirement in the states that persons participating in the activities of a political party, such as primaries, conventions, etc., register publicly as members.

The provisions respecting employment by the Government are in Section 5 of the statute. Congress has forbidden political activity to Government employees, and the Supreme Court has sustained the enactment.[58] The power in this respect as it concerns members of Communist organizations was specifically sustained in *Adler* v. *Board of Education, supra*, as to the public schools. The general power over executive employees was discussed at length in *Bailey* v. *Richardson*.[59]

The restrictions upon Government employment are directly related to the substantive evil at which Congress was aiming in this statute. Infiltration of government by world Communist adherents is one of the specified evils recited by the Congress, and certainly a prohibition of Government employment to such adherents is a direct attack upon that evil. Indeed we can think of no more direct relationship than that which would exist between the objectives of the world Communist movement, as it is described in this statute, and the occupation of Government positions by members of a Communist-action organization.

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[57] 43 STAT. 1071 (1925), 2 U.S.C.A. § 244.

[58] United Public Workers v. Mitchell, 330 U.S. 75, 91 L.Ed. 754, 67 S.Ct. 556 (1947).

[59] 86 U.S. App. D.C. 248, 182 F.2d 46 (D.C.Cir. 1950), *aff'd*, 341 U.S. 918, 95 L.Ed. 1352, 71 S.Ct. 669 (1951).

We think the considerations which validate power to forbid Government employment likewise support the power to forbid defense facility employment. The latter employment is sensitive business, and it would be sheer folly to say that the Government cannot close the gates of such facilities against those who are knowingly members of organizations under the dominion of a foreign government.

The provision respecting passports is in Section 6 of the statute. A passport is addressed to foreign governments and requests for the holder "permission to come and go as well as lawful aid and protection."[60] An American passport, says Hackworth,[61] "indicates that it is the right of the bearer to receive the protection and good offices of American diplomatic and consular officers abroad and requests on the part of the Government of the United States that the officials of foreign governments permit the bearer to travel or sojourn in their territories and in case of need to give him all lawful aid and protection." Only rudimentary reasoning is necessary to a conclusion that the Government may validly decline to confer its diplomatic protection upon, and to request foreign governments to give aid and protection to, a member of an organization operating primarily to achieve the objectives of a world movement such as the Communist movement is defined to be in the statute. Surely a government owes no duty of protection to those who, dominated by a foreign organization, seek its overthrow. Congress can narrow the scope of the passport privilege, so long as the limitation is reasonable.

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[60] United States v. Browder, 113 F.2d 97, 98 (2d Cir. 1940), quoting BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD.

[61] 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW c. 10, § 259 (1942).

Under current rules a person must have a passport in order to leave the United States to go outside this hemisphere.[62] It is urged that that is a restriction upon liberty and is without due process because unrelated to the congressional purpose. But we need not, and do not, enter upon consideration of that question, because, whatever else a passport may validly do, it serves the purposes enumerated by Hackworth, *supra*, and that feature is enough to support denial. We think this provision is directly related to the congressional purpose in this statute and is otherwise valid.

The provision respecting the identification of mail and broadcasts (Section 10) applies to a registered organization, not to the individual members as such. It requires the mail of such an organization to bea the label "Disseminated by ————, a Communist organization". It requires similar identification of broadcasts. No censorship of content is imposed. Congress has frequently imposed limitations upon the use of the mails[63] and on broadcasting.[64] All paid broadcasting must be identified by the name of the person paying for it.[65] So far as our present petitioner is concerned, there seems little to choose between identification as "The Communist Party", as it would be identified without the statute here involved, and

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[62] 22 CODE FED. REGS. §§ 53.1, 53.2.

[63] 25 STAT. 874 (1889), 39 U.S.C.A. § 256; REV. STAT. § 3224, as amended, 39 U.S.C.A. § 259; REV. STAT. § 4041, as amended, 39 U.S.C.A. § 732; 52 STAT. 114 (1938), 15 U.S.C.A. §§ 52, 53; 48 STAT. 77 (1933), as amended, 15 U.S.C.A. § 77e.

[64] 48 STAT. 1088 (1934), as amended, 47 U.S.C.A. § 315; 48 STAT. 1089 (1934), 47 U.S.C.A. § 317. See Trinity Methodist Church, South v. Federal Radio Comm'n, 61 App. D.C. 311, 62 F.2d 850 (1932), *cert. denied*, 288 U.S. 599, 77 L.Ed. 975, 53 S.Ct. 317 (1933).

[65] 48 STAT. 1089 (1934), 47 U.S.C.A. § 317.

as "a Communist organization", which is what this statute requires. Moreover broadcasting is permeated with a public interest,[66] and surely the people are entitled to know when an organization which falls within the definition of a Communist-action organization in this statute is addressing them over the air. All political parties identify themselves on the air; otherwise their appeals are useless. The only conceivable reason for anonymity of political broadcasting is a purpose of deception, and that purpose is enough to validate a requirement of identification.

All publications relating to candidates for elective office in the Federal Government must be identified, showing the names of the persons, associations, committees and corporations responsible for the publication or distribution, under heavy penalties for failure to do so.[67] Newspapers must plainly mark as "Advertisement" all editorial or other reading matter for which a consideration is received.[68] All agents of foreign governments must identify "political propaganda" sent through the mails.[69] It is difficult for us to perceive much substance in the claim that the provisions for the identification of the mail and broadcasts of an organization finally required to register under this Act are invalid. First principles protect the right of the public to be advised of the identity of an organization found to be promoting the objectives of the world Communist movement, as that movement is here defined.

The provisions respecting aliens, which were in Sections 22 and 25 of the statute before us, have been carried

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[66] National Broadcasting Co. v. United States, 319 U.S. 190, 226-7, 87 L.Ed. 1344, 63 S.Ct. 997 (1943).

[67] 62 STAT. 724 (1948), as amended, 18 U.S.C. § 612.

[68] 37 STAT. 554 (1912), 39 U.S.C.A. § 234.

[69] 52 STAT. 632 (1938), as amended, 22 U.S.C.A. § 614.

forward into the 1952 Immigration and Nationality Act.[70] Under the latter provisions sanctions apply to aliens who are members of organizations registered under the Act now before us. We therefore consider them. That membership in the Communist Party is a valid ground for the deportation of an alien is settled by *Galvan* v. *Press*,[71] and that it is a valid ground for denial of bail to an alien pending deportation proceedings is settled by *Carlson* v. *Landon*.[72] There is nothing on the subject to be added to the opinions in those cases. They rest upon the power of Congress over the admission of aliens and the rights of aliens to remain in this country.[73] The rationale upon which the Supreme Court there validated the proscription of alien members of the Communist Party applies directly to members of any Communist-action organization as defined in this statute. We think those rulings govern exclusion and naturalization as well as deportation and bail.

Section 25 of the statute before us[74] also contained a provision respecting denaturalization, which was carried forward as Section 340(c) of the Immigration and Nationality Act of June 27, 1954.[75] It established as *prima facie* evidence[76] in a denaturalization proceeding proof that the person within five years of naturalization became

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[70] See note 53 *supra*.

[71] 347 U.S. 522, 98 L.Ed. —, 74 S.Ct. 737 (1954).

[72] 342 U.S. 524, 96 L.Ed. 547, 72 S.Ct. 525 (1952).

[73] See Shaughnessy v. Mezei, 345 U.S. 206, 97 L.Ed. 956, 73 S.Ct. 625 (1953).

[74] Amending Sec. 305(d) of the Nationality Act of 1940.

[75] See note 54 *supra*.

[76] The full phrase is "prima facie evidence that such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States".

a member of, among others, a registered Communist-action organization. The necessities of proof in a denaturalization case involving foreign allegiance are spelled out in *Knauer* v. *United States*.[11] A denaturalization does not flow automatically from registration; a regular proceeding for the purpose must be brought. No such case is before us, and we therefore express no views upon the problem. Its solution must await a specific test.

The sanctions with reference to tax exemptions and deductions, which are in Section 11 of the Act, forbid income tax deductions for contributions to a registered organization and deny income tax exemptions to such organizations. These allowances and denials fall within the field of congressional grace so long as a reasonable basis appears. This is too well established to require citation. We think these provisions clearly valid.

Concluding, then, our discussions of the several provisions applicable to registration and to registered organizations and their members we find that they are reasonably related to a remedy for the evil depicted in this statute, that the impingement upon First Amendment rights which their effect is not beyond that permissible for the statutory purpose, and that the provisions are not violative of Fifth Amendment rights.

VII

The Party makes a number of additional attacks upon the statute as a whole. It says it is an "outlawry" statute. But many valid statutes declare specified activities to be unlawful. The critical questions concerning a so-called "outlawry" statute are whether the matter prohibited is eligible for prohibition and whether the procedures provided protect the rights of those involved. We have discussed those features of this statute.

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[11] 328 U.S. 654, 90 L.Ed. 1500, 66 S.Ct. 1304 (1946).

The fact, if it be a fact, that no organization could survive registration under the Act is no detriment to the validity of the statute. In the first place, if an organization is actually operating primarily to achieve the objectives of a foreign organization dedicated to the establishment of a totalitarian dictatorship in this country by other than constitutional processes, we perceive no constitutional obstacle to its outlawry. In the second place the inability of an organization to survive registration under this Act arises, if it does arise, not from the terms of the statute but because of the extreme unpopularity of the revealed foreign domination, of world dictatorship, and of the Communist world leadership. This statute does not forbid any person to be a member of the Party, but the Party says that when its members are identified their livelihood and liberty will be jeopardized. But a statutory requirement is not invalid merely because of results which may flow from the unpopularity of the cause affected. Popularity of men and movements varies with time and place. In some periods of our history friendship with Great Britain was unpopular, and at other periods friendship with Russia was popular. It would indeed be senseless to propose that popular causes could be subjected to statutory restrictions but that unpopular ones could not be. Unpopular causes are entitled to the privilege of the public arena, but they must sustain the severe burdens of that arena. So long as they are not denied the privilege, they cannot complain that their unpopularity frustrates them or that the observing public visits upon them its displeasure. Stoutness is indeed a requisite for those who would contest in that arena.

Petitioner urges that the statute contains a predetermination of its nature as a Communist-action organization—a built-in verdict against it. We find no such predetermination. Petitioner is not mentioned. Whether it does or does not fall within the description in the

statute is a matter of evidence, just as it is in respect to every other respondent to a petition before the Board. A statute is not necessarily null merely because it fits a known person. Many valid statutes do.

Petitioner says the statute is a bill of attainder and therefore void. We think it is not. The opinion in the *Garner* case [78] discusses and disposes of the point in so far as it relates to Government employ. The remainder of the point is covered by that part of the opinion in *Douds* in which bills of attainder are discussed.[79] Referring to the familiar cases the Court said:

> "But there is a decisive distinction: in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct."

We think that doctrine applies to the case at bar.

VIII

The next main subject in our consideration of the statute itself is our petitioner's attack upon Section 13(e). That section enumerates eight evidentiary considerations which it requires of the Board in determining whether an organization is Communist-action within the statutory definition. Petitioner says the section is invalid for lack of due process. It says the provisions are irrelevant, vague, and without any rational relation to the derivative facts to be established.

The eight subparagraphs of Section 13(e) direct the Board to take into consideration "the extent to which" an organization does certain things. Roughly paraphrased these are the extent to which

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[78] *Supra*, 341 U.S. at 722-3.

[79] *Supra*, 339 U.S. at 413-14.

(1) its activities are performed pursuant to directives or to effect the policies of the foreign government or organization in which is vested control of the world Communist movement;

(2) its policies do not deviate from those of such foreign organization;

(3) it receives financial or other aid from such foreign organization;

(4) it sends representatives to a foreign country for instruction in the policies or tactics of the world Communist movement;

(5) it reports to such foreign organization;

(6) its leaders are subject to the disciplinary power of such foreign organization;

(7) it operates on a secret basis for the purpose of concealing foreign domination; and

(8) its leaders consider allegiance to the United States subordinate to obligations to such a foreign organization.

The Party denominates these eight specifications "tests" and, having thus characterized them, attacks them severally and collectively.

The Party says that by the definition in Section 2 of the statute the world Communist movement engages in espionage, treason, etc., whereas none of the eight "tests" to be applied to a domestic organization involves any of those offenses; and that thus the whole of Section 13(e) is irrational. The argument misconceives both the text and the purpose of the section. The inquiry with which the statute as a whole is concerned is in two separate parts: (a) What is the world Communist movement? That is dealt with in Section 2. (b) Is a certain domestic organization under the domination and control of that movement, and does it operate primarily to achieve its objectives? The problem at the first stage of the process is the nature, etc., of a world movement known as Communism. The problem at the second stage of the process is simply whether a named organization operates to

achieve the objectives of the world Communist movement, whatever the nature of that movement may be. The so-called "tests" in Section 13(e) are directed at the latter problem, and it alone. Thus construed, as it obviously was intended to be, the section is apt and cogent. We think the division of the inquiry into two steps is a rational one. Certainly it is followed in many types of inquiry.

The Party says the section is too vague to be valid. We find no such infirmity.

The Party says none of the subparagraphs in Section 13(e) specifies how much of any described activity requires a finding of, for example, foreign control; there is no quantitative standard. This argument is an attempt to make out a formula in the statute. But there is no formula. The ultimate finding is to be derived as a conclusion from basic findings. The Board may find full activities in respect to some of these matters, partial activities in respect to some, and a complete absence of activity in respect to some. The Board may make findings in other relevant respects not here enumerated. Having made these several findings, the Board must distil from the composite an ultimate finding whether the respondent is or is not under foreign control, etc. There is nothing unusual about this process; indeed it is quite elementary. It is a familiar process of adjudication based upon fact-finding. Frequently a case discloses numerous basic facts established by the evidence, upon which the trial tribunal exercises its reasoning power and deduces a derivative or ultimate finding. So in the present case.

Moreover this catalog in Section 13(e) is not exclusive. These eight items must be considered, but others which are relevant and of material effect and are offered in competent form must be considered also. Nothing in the statute hints at an exclusive criterion. The Board should, and so far as we can tell did, admit and consider whatever is competent, relevant and material.

The Party argues that evidence merely of the extent to which a respondent does these specified things does not prove or tend to prove any derivative fact in issue, *e.g.*, domination by a foreign government. The argument is clearly without merit. High blood pressure does not prove heart disease, but any competent doctor examining a suspected bad heart would determine and take into consideration the patient's blood pressure. In legal parlance, evidence must be relevant, *i.e.*, must relate to the issue, and must be material, *i.e.*, must have some weight as proof, but there is no legal doctrine that each separate item of evidence must be conclusive.

Somewhat contrary to the contentions just discussed, the Party asserts that Section 13(e) establishes presumptions and that the presumptions are irrational. We find no presumptions, and we are at a loss as to how one would spell out a presumption from the text. As aids to an ultimate conclusion the Board is directed to take into consideration the extent to which a respondent does certain things. The statute says nothing about presumptions. As we have just pointed out, it does not even specify what quantum or what character of evidence shall produce a given result. The section is a catalog of some basic considerations. There are no statutory presumptions.

The Party argues that under the statutory definition in Section 3 the basic inquiry is whether an organization operates "primarily" to advance the objectives of the world Communist movement, and that the mere "extent to which" the organization operates to advance such objectives is an irrational and irrelevant test. We are not told how the Board could ascertain whether a respondent operated "primarily" in a given manner without taking evidence upon the extent to which it so operated, and we are unable to discern how it could do so.

We next turn to the contentions in respect to the subparagraphs separately, avoiding as much as possible

repetition of the general contentions already discussed.

The Party says that the "directives and policies test" in Section 13(e)(1) is irrational. It says that the statutory definition of a Communist-action organization in Section 3(3) refers only to organizations which pursue objectives which are "evil", whereas the test section refers to any objectives, good or bad.

We take it that by "evil" the Party means immediate objectives which are morally wrong. In our view the objectives here referred to need not necessarily be "evil" in that sense. If the organization in question is dominated by a foreign government or organization, as the definition prescribes, and operates primarily to advance the objectives of the world Communist movement, as the definition describes that movement, Congress may well impose upon it the sanctions of this Act, even if the active or immediate objectives are not "evil". Some of the objectives of the Soviet Union and of the world Communist movement may be excellent, even laudable; as to that we express no opinion here. If the Soviet Union has policies of peace and racial equality before the law, as the Party says it has, those are laudable objectives. Our Government has those objectives, as do many other governments. The crucial factor in the statute before us is the aim, spelled out in detail, of the world Communist movement to disestablish our system of government. Our Government may well oppose the establishment in this country of a totalitarian dictatorship of the sort described in the definition, even if such a dictatorship does not meet the definition of "evil" or even if it has many beneficent features.

The Party says the "non-deviation test" in Section 13(e)(2) is vague and irrational. We think it difficult to conceive of a more proper standard for the purpose. In an inquiry as to the domination of one organization by another, the extent of the deviation one from the other in views and policies is both relevant and material; indeed it would be one of the necessary considerations. If

there were no similarity, domination would be negatived almost conclusively, whereas, if there were identity, domination would be a definite possibility, if not a certainty. Petitioner says the test includes non-deviation respecting policies calculated to secure peace and welfare as well as others characterized as evil. The argument misses the point of this section of the statute. The point is foreign domination; identity of purpose and policy, whether good or bad, is clearly relevant in the proof. Indeed the Board might conclude on this particular phase of its inquiry concerning some domestic organization that it adheres only to the admirable policies of the foreign organization, a partial non-deviation negativing domination. But the possibility of such a conclusion does not nullify the propriety of the inquiry.

Petitioner says that under the non-deviation test a respondent organization could prove its freedom from foreign domination only by proving its failure to adopt any views contrary to those of the Soviet Union. But this paragraph is not limited to absolute identity of views. We repeat once more that these subparagraphs do not constitute a formula for ascertaining foreign domination; they constitute a catalog of required considerations. They involve "the extent to which"—not "whether". So there is no merit in this contention of the Party. Furthermore, even if the statute required consideration of total identity, the provision would be valid, because, if an organization never had any policy which differed from the policies of the world Communist movement, that fact would certainly be pertinent to an inquiry into the relationship between the two. It might not be conclusive, but it would be pertinent.

Subparagraph (3) of Section 13(e) directs the Board to consider the extent to which a respondent receives "financial or other aid" from the foreign government which directs and controls the world Communist movement. The Party says the inclusion in the test of "or

other aid" vitiates it. But we think not. Any type of aid received by one organization from another is pertinent to the question whether the one operates to achieve the objectives of the other. Petitioner says that, while it is an obvious truth that a contributor has a lever by which to shape the policies of the contributee, the terms of the donation are the relevant consideration and the bare fact of the donation is irrelevant. We agree that the terms of a contribution are more, even much more, material to the issue of intended influence by means of the gift, but the bare fact of the gift is not irrelevant to the consideration. It does not have the persuasive weight carried by the terms imposed by the donor, but the fact of the gift is certainly an admissible item of proof. Of course it may be explained away, as may any of the statutory specifications of considerations.

The fourth subparagraph under Section 13(e) provides that the Board shall consider the extent to which a respondent sends representatives to foreign countries for instruction in the principles or policies of the world Communist movement. The Party says that the section is invalid, because it fails to require that the Board also consider whether respondent is obliged to or does conform to what its representatives were taught. Certainly, if the Board were to make an ultimate finding of foreign domination upon the basis of bare evidence that respondent sent agents abroad, the Party would be perfectly correct upon the point. But the argument does not go to the validity of the subparagraph as such, but merely points to possible rebuttal proof and to a contention which might be addressed to findings made on this item in a particular case.

We think we need not prolong this opinion by discussing in detail the contentions made by our petitioner, the Party, in respect to the remaining four of the subparagraphs of Section 13(e). They are variations of contentions already discussed, and what we have already said applies to them.

IX

The Party says that the order of the Board is invalid because the original appointments of members to the Board were in violation of the Constitution. It says no vacancy had "happened" when the appointments were made, that vacancies did not happen during a recess of the Senate, and that in any event the appointments expired January 2, 1951. The sequence of dates is as follows:

September 23, 1950	Subversive Activities Control Act approved.
September 23, 1950	Congress adjourned or recessed to a day certain.
October 23, 1950	President made recess appointments.
November 27, 1950	Congress reconvened.
November 27, 1950	President transmitted nominations.
January 2, 1951	Congress adjourned *sine die*.
April 23, 1951	Hearings began before panel of three Board members.
August 9, 1951	Senate confirmed nominations.
October 20, 1951	One member retired from panel.
July 1, 1952	Hearings before panel concluded.
July 28, 1952	Briefs and proposed findings filed.
August 6, 1952	Reply briefs filed.
August 14, 1952	Argument before panel.
October 20, 1952	Panel issued recommended decision.
November 21, 1952	Exceptions filed.
November 24, 1952	Exceptions filed.
January 7, 1953	Oral argument before full Board.
April 20, 1953	Report and order of the Board issued. The action of the Board was unanimous, four members signing the order. There was then one vacancy in the membership.

We think we need not discuss this contention of petitioner at length. The minimal effect of any invalidity of appointment upon the final order is obvious from the foregoing table. The appointments were indubitably valid from August 9, 1951. The taking of evidence, which began April 23, 1951, did not conclude until July 1, 1952. The evidence was taken by a panel of members, but it could have been taken by a hearing examiner (Section 13(c) of the Act) and not by a member at all. If prior to confirmation these Board members were merely hearing officers whose taking of the testimony was thereafter ratified by the Board, the proceeding was valid. All findings and conclusions were adopted by a properly confirmed Board after hearing before that Board. The order therefore would be valid regardless of the technical legal status of the members as members prior to formal Senate confirmation. We see no need to examine further the complicated questions posed by petitioner as to constitutional recess appointments.

X

We directed the parties to discuss in a reargument, the applicability of the Communist Control Act of 1954[80] to this proceeding. In respects other than those already discussed we think it has no application. Its validity and the validity of the order before us are independent questions. Either might stand without the other.

XI

We come now to the second main part of the case, consideration of the factual findings of the Board. The problem is whether the Board's ultimate finding that the petitioner in the case at bar is a Communist-action organization within the statutory definition is or is not supported by a preponderance of the evidence in the record.

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[80] Pub. L. No. 637, 83d Cong., 2d Sess., 68 STAT. 775.

The statute says that the findings of the Board as to the facts shall be conclusive if supported by the preponderance of the evidence (Sec. 14(a)). That is a less stringent restriction upon the function of judicial review than is customary in such statutes. By the same token it imposes a laborious task upon the reviewing court. We must ascertain the preponderance of the evidence in respect to the findings as that problem is put to us by our petitioner.

Space does not permit comment upon the evidence on each minute issue of fact, or an attempt here to evaluate particles of the proof. But we can indicate the extent, nature, particularity, and personal character of the testimony presented by the Government, and the nature and extent of the evidence presented by the Party, including the character of both its denials and its explanations.

The Attorney General presented the oral testimony of twenty-two witnesses, nineteen of whom had been members of the Party. Thirteen of these nineteen had been members until 1945 or later, four of them as late as 1952. Some of them voluntarily quit the Party, some were expelled, and some were agents of the F.B.I. and acting as such during their membership.

These witnesses testified in large measure concerning practices prior to the disaffiliation of the Party from the International, but each described operations in the Party up to the time of his resignation or expulsion. They stated their views of the reasons for the present concealment of Party matters such as records, membership, etc., and their views concerning the objectives of the Party and its relationship to the world Communist organization and its leaders.

For illustrative purposes we turn to the witness Philbrick. He was an agent of the F.B.I. who from 1942 to 1944 was a member of the Young Communist League and from 1944 to 1949 a member of the Communist Party.

Thus his entire period of membership was after the disaffiliation of the Party from the International. He held several positions in the League, becoming state treasurer for its successor organization, American Youth for Democracy. He also held a series of positions with the Party, being a member of the State Educational Commission, chairman of leaflet production; then he was educational director of the Eighth Congressional District, and later a member of the "pro group", an underground group of professional people. He organized and taught Party classes. These classes studied how to apply the Communist Classics to current problems. His membership in the Party was never an open membership; at times he carried a card, and at times he did not. He identified by name a number of the Party leaders and described their activities. He described the operations and purpose of the Party builders' conference and a number of the speakers and speeches. The *Daily Worker*, he said, is the central organ of the Party, and every member is supposed to read it. He described the intra-Party lines of communication between groups or cells, and the caution taken in respect to meetings. The sessions of the cells were devoted to study, literature sales, and collection of dues. As literature director he furnished his cell regularly with copies of *For a Lasting Peace, Political Affairs, The Worker, The Daily Worker*, and many books. A principal topic of discussion in early 1948 was Zhdanov's report, which appeared in the *Cominform Bulletin*. Another topic was Yugoslavia and Marshal Tito. He testified that a member of the Party could not disagree with a position taken by the Cominform and remain a member of the Party. He discussed the study of capitalism in the United States as a developer of wars, and the teaching that "the true patriot is the one who fights on the side of the working class and who fights against capitalism." He testified that the basic

objective of the Party while he was a member was "to establish a Soviet State in the United States following, without any deviation, the dictates and the methods laid down by Marx, Engels, Lenin, and Stalin." He did not recall hearing any criticism by leaders of the Party directly against the Soviet Union, or any instance in which, when the policy of the Soviet seemed to differ from the policy of the United States, any leader of the Party appeared sympathetic to the United States.

The testimony of the other witnesses presented by the Attorney General as to the operation of the Party after 1940 covered other phases of the alleged operation, but the foregoing illustrates the specificity and claimed first-hand knowledge from which the witnesses spoke.

On the other side of the controversy, as we have said, the Party presented three witnesses. The testimony of John Gates reveals the tenor of that presentation. In addition to the testimony from Mr. Gates which we have already described, this witness said that he has been a member of the National Committee of the Party since 1945. The immediate objectives of the Party, he said, are the improvement of the democratic rights of the American people, and peace. The ultimate objective is a revolutionary change, the superseding of the capitalist system by a socialist system. The Party advocates the achievement of these objectives by peaceful and constitutional means. Democratic centralism, the principle which governs Party organization and function, means that all Party policies and programs are formulated by participation of every member, and once the policies are formulated, democratically, each and every member is obligated to carry out the decision. Mr. Gates denied (1) that the Party has since January, 1946, been affiliated with any other organization; (2) that it contributed to the Communist Information Bureau; (3) that any rep-

resentative of the Party attended any meeting of that Bureau; (4) that any representative of the Bureau ever visited the Party; (5) that the Party ever received any directive or instruction or any written communication of any kind from the Bureau; (6) that the Party received any directives or instructions from *The Lasting Peace*, the newspaper which published information as to what was going on within the various Communist parties throughout the world; (7) that the Party ever received any instructions or directives from the Communist Party of the Soviet Union, or from any representative of that Party, or from any official of the Soviet Union, or from any Communist Party of any other country; (8) that the Communist Party of the United States ever sent any representative to the Soviet Union or to any other foreign country for instruction or training in Communism; and (9) that the Party reported its policies, etc., to the Soviet Government, the Communist Party of the Soviet Union, the Communist International, or the Communist Information Bureau. He stated that the funds of the Party are obtained entirely from dues, annual collection campaigns, and the sale of literature. In respect to the size of the Communist clubs Mr. Gates testified that there were many discussions, that they were interested in bringing about a 100 per cent activity on the part of the membership, that many Communists were being deprived of their constitutional rights, jeopardizing their means of livelihood, and that for those reasons steps were taken to protect the members, reducing the size of the clubs, eliminating lists of members and membership books. He said that the leaders of the Communist Party of the United States recognize no disciplinary power of the Soviet Government, the Communist International, the Information Bureau, or any agent thereof over an American Communist, that American Communists are not bound by any principle or doctrine to execute the decisions of foreign leaders.

Mr. Gates testified the Communists' position is that the national interests of all peoples on earth are identical; that the Party of the United States formulates its policies on the basis of a scientific approach, consisting of the general principles of Marxism-Leninism, which are general scientific principles to be applied in every situation according to time, place and circumstances; that the policies of the Party of the United States are not in many respects similar to the policies of the Party of the Soviet Union, because the circumstances differ, the United States having a capitalistic system and the Soviet a socialistic system; but that the Party of the United States agrees with the Soviet Party on peace. Mr. Gates said that he owed allegiance to the United States and to it alone.

On cross examination Mr. Gates testified that there is a world Communist movement but not of the kind described in the Attorney General's petition. He said that everything he has done is in the defense of democratic rights, economic welfare, and peace, and ultimately in the interest of the establishment of socialism, which is the first stage toward Communism. The Communist International was an actual organization of the world Communist movement, and the Party of the United States was affiliated with it at one time. He knows of no instance where the *Daily Worker*, while he was editor, supported this government in opposition to the Soviet Union, because it is his opinion that the Soviet has never put forward policies in any way contrary to the interests of the American people. He testified to the same effect in respect to deviation from the policies of Cominform, saying that if the Communists of the United States have expressed no disagreement with the views of *The Lasting Peace* it is because they believe those views have not been in contradiction to the interests of the American people. They consider the Soviet Union to be the out-

standing socialist country of the world. To his knowledge the *Daily Worker* has never disagreed with the views and policies of the Soviet Union. It has been stated many times, although not since 1946, that the Soviet Union is the fatherland of the world proletariat. The witness contradicted a statement made by Earl Browder that during the fifteen years of the Browder leadership all major policies of the Party of the United States had the previous knowledge and consent of the international Communist leadership.

The Party attacks the credibility of the witnesses presented by the Government. In this connection it stresses that some of these witnesses were employees of the Federal Bureau of Investigation while they were members of the Party, that others were expelled from membership in the Party, and that some were under charges of false swearing. Full opportunity for cross examination of these witnesses was afforded at the hearing before the Board, and full opportunity was also afforded for the presentation of rebuttal testimony. The evaluation of credibility is primarily a matter for the trier of the facts, and a reviewing court cannot disturb that evaluation unless a manifest error has been made. Moreover the testimony of the witnesses against whom charges are said to have been made was consistent with and supported by masses of other evidence. Petitioner attacks especially the testimony of the F.B.I. operatives, as being without probative weight because they were Government operatives. But we know of no such doctrine. Government agents, especially detectives, are charged with the duty of observing operations to which they are assigned. Their testimony is a commonplace in our courts. We do not consider employment by the F.B.I. or the mere fact of expulsion from the Party as substantial bases for blanket attacks upon credibility. They might be grounds upon which the trier of the facts would

receive such testimony with caution, but standing alone they do not constitute so serious a detriment to credibility as to be grounds for reversal.

XII

We come, then, to consider the disputed issues of fact. Broadly speaking, these issues concern two subjects, (1) the existence and nature of the world Communist movement and (2) the relationship of the Party USA to the world movement. We divide our consideration accordingly.

In Section 2 of the Act, as we have pointed out, Congress made findings upon the existence and the nature of the world Communist movement. Some years ago, a difference of opinion existed as to the extent to which courts are bound by legislative findings of facts in cases in which constitutional questions are posed.[81] Since then the Supreme Court has resolved the problem in *American Communications Ass'n* v. *Douds* and *Galvan* v. *Press*, both *supra*. The rule, as we understand it, is that, if it appears Congress has power over the subject matter of a statute, and if the findings of fact are not baseless but are based upon extensive investigation, the courts are to adopt those findings. The opinion in the *Galvan* case contains the following statement concerning the section, *i.e.*, Section 2 of the Internal Security Act of 1950, which we are now considering:

> "Under the 1940 Act, it was necessary to prove in each case, where membership in the Communist Party was made the basis of deportation, that the Party did, in fact, advocate the violent overthrow of the Government. *The Internal Security Act of 1950 dispensed with the need for such proof.* On the basis

[81] See the opinions in National Maritime Union of America v. Herzog, 78 F.Supp. 146 (D.C.D.C. 1948).

> of extensive investigation Congress made many findings, including that in § 2(1) of the Act that the 'Communist movement * * * is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship,' and made present or former membership in the Communist Party, in and of itself, a ground for deportation." (Emphasis ours.)[82]

From that viewpoint, and without going further, there is, then, for our purposes in reviewing this order under this statute, a world Communist movement whose purpose it is, by treachery, sabotage, or any other necessary means, to establish a Communist proletarian dictatorship throughout the world.

However the Board did not rely upon the Congressional findings as to these facts but thought it desirable to make independent findings based upon evidence adduced before it. That evidence was largely documentary. We refer here to a few bits of it.

Communism derives its name from Marx's *The Communist Manifesto*. Basic to present-day Communism is Marxism-Leninism. The meaning of Marxism-Leninism is to be found in the writings of Marx, Lenin, Stalin, and their collaborators, which works are known in this litigation as the "Classics". Marxism is a form of Socialism, the basic tenet of which is the ownership by the state of all means of production and distribution. According to Marx all society consists of antagonistic classes, the principal one being the capitalist class, which, as a result of owning privately the means of production, exploits the property-less working class. Marx expressed particular interest in the property-less factory workers, designated as the proletariat, whose numbers had increased

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[82] *Supra*, 347 U.S. at 529.

as a result of industrialization. The conclusion of Marx was that the only true value is the labor of the industrial working class. The objective of Communism is to bring capitalism to an end and to substitute for it a dictatorship of the proletariat in a socialist state.

The Communist Party was formed in 1898 in Russia. Lenin, a Russian revolutionist who had adapted Marxism to Russian revolutionary purposes, had a group within the Communist Party called the Bolsheviks. He recognized that two things were most important to the success of the proletariat revolution: rigidity of organization and flexibility of policy. His group of Bolsheviks obtained control of the Communist Party in Russia. Organizationally he held to the necessity of creating a group of disciplined professional revolutionists, among whom no dissent would be tolerated. After the Russian revolutions of 1905 and 1917 the Communist Party destroyed capitalism in Russia and then sought help throughout the world to support their victory. Following Lenin came Stalin, who further advanced the Marxist-Leninist ideas in a practical way.

In his *Problems of Leninism*, published in 1934, Stalin specified as one of the three fundamental aspects of a dictatorship of the proletariat "The utilisation of the power of the proletariat for the organisation of socialism, for the abolition of classes, and for the transition to a society without classes, to a society without a state." He stressed the necessity for violence, asserting: "But, of course, the dictatorship of the proletariat does not merely mean violence, although there is no dictatorship without violence." He quoted Lenin to the same effect. In his *Foundations of Leninism*, published in 1939, Stalin referred to a phrase used by Marx which seemed to indicate that Marx conceded the possibility of a peaceful evolution in certain countries outside of the European Continent. But, said Stalin, Lenin pointed out that condi-

tions had changed by 1917 and he had then said that the preliminary condition for the revolution "is the smashing, the destruction of the 'ready-made' state machine'". Stalin said, "Therefore, Lenin is right in saying: 'The proletarian revolution is impossible without the forcible destruction of the bourgeois state machine and the substitution for it of a new one * * *.'"

In 1919 the First Congress of the Communist Parties, held in Moscow and headed by Lenin, founded the Communist International (called the Comintern), described by the Communists as a new type of international revolutionary proletarian organization. The theses and statutes adopted by the Comintern in 1920 contained the following:

> "The Communist International makes its aim, to put up an armed struggle for the overthrow of the International bourgeoisie and to create an International Soviet Republic as a transition stage to the complete abolition of the State. The Communist International considers the dictatorship of the proletariat as the only means for the liberation of humanity from the horrors of capitalism. The Communist International considers the Soviet form of government as the historically evolved form of this dictatorship of the proletariat.
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> * * * * * * *
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> "* * * To all intents and purposes the Communist International should represent a single universal Communist Party, of which the parties operating in every country form individual sections. * * *"

The statutes of the International contained the following:

> "Sec. 1. The new International Association of Workers is established for the purpose of organizing common activity of the workers of various countries who are striving towards a single aim: the overthrow of capitalism; the establishment of the dictatorship of the proletariat and of the International

Soviet Republic; the complete abolition of classes, and the realization of socialism—the first step of Communist Society."

And also, among the theses and statutes of the Third International, the following expressions are to be found:

"• • • Only a violent defeat of the bourgeoisie, the confiscation of its property, the annihilation of the entire bourgeois governmental apparatus, parliamentary, judicial, military, bureaucratic, administrative, municipal, etc., even the individual exile or internment of the most stubborn and dangerous exploiters, the establishment of a strict control over them for the repression of all inevitable attempts at resistance and restoration of capitalist slavery—only such measures will be able to guarantee the complete submission of the whole class of exploiters.

• • • •

"• • • It is especially necessary to carry on unlawful work in the army, navy, and police, as, after the imperialist slaughter, all the governments in the world are becoming afraid of the national armies, open to all peasants and workingmen, and they are setting up in secret all kinds of select military organizations recruited from the bourgeoisie and especially provided with improved technical equipment."

The *Programme of the Communist International*, a publication of the Workers Library Publishers, Inc., contains the constitution and rules of the Communist International. Included in these rules is the following paragraph:

"Party questions may be discussed by the members of the Party and by Party organizations until such time as a decision is taken upon them by the competent Party committees. After a decision has been taken by the Congress of the Communist International, by the Congress of the respective Sections, or by leading committees of the Comintern, and of its various Sections, these decisions must be unreservedly carried out even if a Section of the Party mem-

bership or of the local Party organizations are in disagreement with it."

The Comintern was dissolved as an organization in 1943, and four years later a new international organization, known as the Communist Information Bureau, or Cominform, was formed by the Communist Parties in countries of Europe and Asia. There is no evidence of any dissolution of the world movement or of any abandonment of the policies and program enunciated by Joseph Stalin. On the contrary, ample evidence is shown that the movement under its Soviet leaders continues as it was planned.

The foregoing is drawn from a considerable mass of material. Out of the whole of the evidence comes a picture of a world movement which has ultimate objectives and interim objectives. The ultimate objective is a classless, stateless society ruled by the proletariat of the world. The basic concepts of this ultimate objective are that the sole value is labor and that capitalism and nationalism are merely means for exploiting the masses of workers. Thus capitalism and nationalism must be destroyed. In the interim the program calls for a small, hard core of revolutionaries, formed into a disciplined Party in every country, who are a vanguard of workers and fighters for the unorganized and suppressed masses of workers. This Party is to attain control of the government of its country for the purpose of destroying its present form and, ultimately, to weld it into the stateless world society. In this interim operation the Party must be ruthless. When the Party takes over the government it is the expectation that the masses will rise and make the Party government a majority government. In this interim period the present government of Russia, the Soviet Union, because it is the first and biggest government thus far brought into control of the Communists,

must be protected and preserved as Communistic at any cost.

The Board made a finding, based on evidence adduced before it, that there exists a world Communist movement substantially as described in Section 2 of the Act. We are of opinion that that finding is supported by a clear preponderance of the evidence.

XIII

We come, then, to the second main division of the facts. This deals with the policies and program of the Party USA and its relationship to the world movement. The Board, pursuant to the mandate of Section 13(e) of the Act, made findings under each of the section's eight subparagraphs, and these, in due course, we will review item by item. For the moment, however, we observe that some things disclose their nature by set characteristics, basic factors which cannot be ignored. Thus we know fish from fowl. In other words, while all relevant facts are cumulative in delineating a completed whole, it is frequently true in respect to derivative facts that certain underlying basic facts, perhaps few in number, determine the final answer. Such facts are heavy in the scales. This is the situation in the case at bar, and we turn now to consideration of some preponderant basic facts. From the record as a whole six such facts emerge as a foundation for the ultimate finding.

1. Prior to 1940 the Communist Party USA was a section of the Communist International, the Comintern. No substantial dispute exists as to this area of the past. The Third Convention of the Party USA, held in 1921, adopted a resolution which read as follows:

> "The Communist Party will systematically and persistently propagate to the working class the idea of the inevitability of, the necessity for a violent revolution and will prepare the working class for armed insurrection as the only means for the destruction of the bourgeois state and the establishment of the proletarian dictatorship based upon soviet power."

A Special Convention of the Party USA, also held in 1921, adopted a resolution in which it "hereby reaffirms its position as an integral part of the Communist International" and unanimously adopted the 21 Points for Affiliation with the International.

Among the twenty-one conditions for membership in the International thus adopted by the Party USA were the following:

> "12. All parties belonging to the Communist International should be formed on the basis of the principle of democratic centralization. At the present time of acute civil war the Communist Party will be able fully to do its duty only when it is organized in a sufficiently thorough way, when it possesses an iron discipline, and when its party centre enjoys the confidence of the members of the party, who are to endow this centre with complete power, authority and ample rights.
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> • • • •
>
> "16. All the resolutions of the congresses of the Communist International, as well as the resolutions of the Executive Committee are binding for all parties joining the Communist International. • • •
>
> "17. In connection with the above, all parties desiring to join the Communist International should alter their name. Each party desirous of joining the Communist International should bear the following name: Communist Party of such and such a country, section of the Third Communist International. • • •
>
> • • • •
>
> "21. Those members of the party who reject the conditions and the theses of the Third International are liable to be excluded from the party."

At the Eighth Convention of the Party USA in 1934 a manifesto was adopted, which declared, among other things, "The only way out of the crisis for the toiling masses is the revolutionary way out—the abolition of capitalist rule and capitalism, the establishment of the Socialist society through the power of a revolutionary workers' government, a Soviet government."

A delegation from the Party USA attended the Seventh

Congress of the International in 1935 and were among those who formally assured Stalin "that the Communists will always and everywhere be faithful to the end to the great and invincible banner of Marx, Engels, Lenin and Stalin. Under this banner Communism will triumph throughout the world."

Thus it is clear that in the years prior to 1940 the Communist Party USA was dominated and controlled by the world Communist movement.

The problem in dispute, then, is whether the same condition exists in present times. The Party denies that since 1940 it has been dominated or controlled from abroad. It also says: (1) Past history is not relevant or, even if relevant, is not material;[83] (2) the Party USA was disaffiliated from the Comintern in 1940; and (3) the witnesses who testified to various features of recent operations by the Party were devoid of credibility. We discuss these contentions *seriatim*.

The past is clearly pertinent to the present nature of a person or an organization. Surely a person's education and experience are pertinent to his present nature. The same is true of an organization. As a matter of fact it is rarely, if ever, possible to prove present nature by some instantaneous, contemporaneous fact, totally ignoring the whole of the past. Not only is the past clearly pertinent, it may be quite material to a determination of present nature. Whether it is material depends upon whether there is affirmative evidence of a departure from the established past. In the ordinary affairs of life and in ordinary litigation, if a person or an organization is shown to have had over many years a certain policy and program, and no more is shown, the conclusion

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[83] The Party makes an argument that only post-Act evidence, *i.e.*, evidence relating to activities since the enactment of the statute, is pertinent in the present proceeding, and that such evidence in this record is insufficient to support the findings. We see no basis for such an evidentiary restriction upon proof as to nature, policies and program.

is clearly indicated that he or it has the same policy and program in the present. He may prove that he has changed, and in the light of such evidence the past may lose its materiality. We are of opinion that the past nature of the Party USA is pertinent to the present inquiry and that it may or may not be material, depending upon the evidence showing a departure from the past.

In line with the thought which we have just indicated, the Party says that it disaffiliated itself from the Communist International in 1940. It concludes from that fact that the established nature of its past cannot be considered in determining its present nature. But there are flaws in that contention. The disaffiliation was an organizational separation. The international organization itself was disbanded in 1943, but the world Communist movement did not then cease to exist. The movement, intact both in theory and in program, continued to exist. Stalin was the leader of the Communists long after the Comintern ceased to exist, and he, as we have noted, was the successor to Lenin and protagonist of the ideas of Marx and Lenin. To demonstrate a changed nature in the Party USA, some assertion of a change in substantive belief and program would have to be made. No such evidence was presented by the Party. The tenor of its proof was that the Communist movement is not as this statute and the Attorney General's petition pictured it. The Party witnesses did not assert a cleavage in policy or program between the Party and the international movement. At the time of the disaffiliation the convention of the Party declared that this action was "for the specific purpose of removing itself [the Party] from the terms of the so-called Voorhis Act",[84] "which law would otherwise tend to destroy, and would destroy, the position of the Communist Party as a

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[84] Act of Oct. 17, 1940, 54 STAT. 1201, as amended, 18 U.S.C. § 2386.

legal and open political party of the American working class." The Party's witness Flynn described the event as "a friendly divorce".

We think a mere organizational disaffiliation, without more, does not render evidence of the Party's past immaterial to its present nature.

It seems to us, therefore, that the first major feature of the facts relating to the Party USA is that prior to 1940 the Party was part of the international Communist movement and that, although there was an organizational disaffiliation in 1940, no evidence has been presented which would indicate that since the disaffiliation the Party has repudiated either the policy or the program of the world movement.

2. The Party calls itself the "Communist Party of the United States of America". This is the name specified by the Communist International as the name by which a Party affiliated with the international movement must be known. The Communist parties in the other countries of the world are certainly motivated by a common cause. They have a common doctrinal basis and a common ultimate objective, and they have an international organization, which today, as we have noted, is known as the Communist Information Bureau, or Cominform. The Party USA is not affiliated organizationally with the Cominform, but it is difficult for us to see why the Party would call itself the Communist Party of the U.S.A. if it were not in fact a part of the Communist movement in theory and program.

3. The present organization of the Party USA resulted from a revulsion on the part of a group of its leaders against what they considered a departure from the program and principles of world Communism. In 1944 the Party underwent a reorganization under the leadership of Earl Browder. It became known as the Communist Political Association; it de-emphasized some

Marxism-Leninism principles and advocated a peaceful coexistence of the United States and the Soviet Union. In the spring of 1945 a French communist by the name of Duclos published an article severely criticizing the attitude and action of the Communists in this country. Following that publication a leading Soviet Union Communist, Manuilsky, being then in San Francisco, expressed to the American Communist leaders the view that the Party USA should follow the counsel of the French Communists. Browder's leading antagonist in the Party councils was William Z. Foster, who attacked Browder as preaching anti-Communism, as fighting the Communist Party, and as being a "revisionist". For some years prior to 1940 Foster had been an official of Communist International. In July, 1945, the Communist Political Association was reorganized into the Communist Party of the U.S.A., Browder was ousted, and Foster was made the National Chairman of the Party. Six of the present leaders of the Party were members of the delegation to the convention of the International in 1935 and participated in the declaration of fealty to Stalin.

4. The amended answer of the Party says that Marxism-Leninism is basic to the Communist Party USA. And, as we have pointed out, while the tenets of Marxism-Leninism, forcefully set out in the writings of Marx, Lenin and Stalin, permit a wide flexibility in tactics, that is, of intermediate activities and objectives, they admit of no deviation from the ultimate objective, which is a classless, stateless world. If the Communist Party USA does not adhere to the basic ultimate objective of Marxism-Leninism, some vivid evidence to that effect should be readily available. Such a position on the part of the Communist Party USA would be a noteworthy fact, which surely would be reflected somewhere. But this record contains no such evidence.

In this connection the Party points to the preamble to its constitution, adopted in 1948, which contains the following sentence: "The Communist Party upholds the achievements of American democracy and defends the United States Constitution and its Bill of Rights against its reactionary enemies who would destroy democracy and popular liberties." But that recitation must be viewed in the light of the established position of Communist leaders that American democracy has gone far in protecting the rights of minorities and of working people and in advancing the economic status of such people, and that in that respect American democracy receives the plaudits of those leaders. But that position in no way negates the ultimate stateless world objective of the Communist movement. Further in this connection it is interesting to note the description of the intermediate program of the Party USA, as described by the Party through its witness Gates. Mr. Gates testified that the historic mission of the working class is the establishment of socialism; that the Party USA advocates the peaceful and constitutional road to socialism; that it advocates a party composed of a coalition of all exploited classes and believes that this party will win an election but that the monopolists will not accept this result and will use violence to overthrow the people's government; that the new government should take measures to anticipate this violence and should remove from the army, navy, and police force all generals, etc., who are sympathetic to monopolists, and replace them with officers who are sympathetic to the cause of the common people; that thus the peace government would be forced by necessity to take revolutionary measures to prevent its overthrow; and that this process is in no way contradictory to the principle of dictatorship of the proletariat.

5. We note next; without discussion, that the evidence shows that the Party press, the *Daily Worker*, follows

the views of the publication of the Cominform, which is known as *The Lasting Peace.*

6. The next outstanding feature of the proof is an elaborate demonstration in the evidence presented by the Government that the Party USA has never differed in policy or program with the Soviet Union. Most notable in this evidence was the meticulous portrayal of many major international questions upon which the United States Government and the Soviet Union have differed, and the striking fact that in every such instance the Party USA has supported the position of the Soviet Union. Examples of such matters are the Truman Doctrine, the Marshall Plan, ECA, the North Atlantic Pact, control and inspection of atomic energy, the seating of Yugoslavia in the United Nations Security Council, the representation of China in the United Nations, the peace treaty with Japan, the William Oatis case, and the Korean War. The Party has consistently adhered to the view of the Soviet Union that the United States is an imperialistic nation which seeks world domination. Quite vivid is the identity of the course of the Party USA with the course of the Soviet Union when the latter's course changed abruptly. The Partv denounced Fascism in Nazi Germany until the Hitler-Stalin Pact in 1939, when the Party switched to the Soviet Union position. When the Pact was abrogated in June, 1941, and Hitler came into conflict with the Soviet Union, the Party promptly switched its attitude and thereafter urged that World War II was a just war. The Party strongly opposed lend-lease aid to Great Britain. It took the same position as did the Soviet in 1947-49 in regard to the internal situation in Greece, and in 1948 in respect to the Czech government. Its course precisely paralleled the Soviet Union's actions in respect to the Tito government in Yugoslavia, including an abrupt reversal of attitude in June, 1948, when the Cominform

attacked Tito. At each stage the Party supported the Soviet position in respect to the blockade of Berlin in 1948. Of current significance is the testimony and documentary evidence establishing that the Party USA and the Soviet Union express the same views regarding Korea. Both maintain that the Syngman Rhee government is a reactionary "puppet regime"; both vigorously condemn the hostilities in Korea as the direct result of imperialism and aggression; and both insist the United Nations police action was illegal and aggressive toward North Korea.

The Party does not deny the facts of the identity of the program and policies of the Soviet Union and of the Party. It makes two contentions in respect to them. In the first place it says the statutory phrase "do not deviate from" (Sec. 13(e)(2)) is the sole pertinent inquiry in respect to identity of views and policies, and that that phrase has reference only to instances where the Soviet Union first adopted a policy and the Party thereafter adopted it. That is obviously an untenable argument. The statutory phrase refers to identity or coincidence and not to chronological adoption. In the second place the Party, through its witnesses, says that the identity of views of the Soviet Union and the Party is a coincidence. Thus the witness Gates testified that while he was editor of the *Daily Worker* he could think of no instance where that paper supported this Government in opposition to the Soviet Union; that this was because the Soviet Union has never put forward policies in any way contrary to the interests of the American people. He said that if the Communists in this country have expressed no disagreement with the views of the Cominform it is because they believe those views have not been in contradiction to the interests of the American people. He testified that, so far as he knows, the views and policies of the Soviet Union are truly in

the interests of the American people. The Party witness Flynn testified to the same effect.

It seems to us that the foregoing six considerations—(1) that the Party was prior to 1940 a section of the Communist International and, although it was disaffiliated organizationally, it presents no evidence of a repudiation of world Communist doctrines; (2) that the Party calls itself the Communist Party of the United States of America; (3) that the present organization of the Party had its origin in a revulsion against a departure from the world Communist program; (4) that Marxism-Leninism is basic to the Party; (5) that the Party's press follows closely world Communist views; and (6) that the policies of the Party and its views upon all issues have for years been identical with those of the world Communist leaders—are the key considerations in the inquiry as to the relationship of the Party to the world movement and its leadership.

XIV

We turn next to the mandate of Section 13(e) of the statute and to the findings made by the Board pursuant to it.

Petitioner attacks all these findings first upon the same grounds as were its attacks upon these subparagraphs as parts of the statute itself. We have discussed those contentions in detail in discussing the statute. Petitioner also attacks severally the findings under each subparagraph of the section.

Proceeding under the requirement of Section 13(e)(1), the Board made an elaborate examination of the policies and directives of the Party, devoting to the subject almost 130 pages of the printed report. Its conclusions are

stated in eleven paragraphs. In substance they are that the Party's organizational forms are based upon directives of the Soviet Union and are carried out to effectuate the policies of the world Communist movement; that by the acceptance of democratic centralism the Party subjects itself to the authority of the Soviet; that the Party advocates the overthrow of imperialist governments, including the United States; and that the major programs of the Party are set forth by the Soviet for the accomplishment of the objectives of the world Communist movement. Without recapitulating or reciting the multitudinous bits of evidence which underlie these findings, we simply state that in our view a clear preponderance of the evidence supports them. As we have made clear, there is scarcely a dispute as to the period prior to 1940, and there is ample evidence in this record as a whole, when balanced against the proof offered to the contrary, to support their accuracy as to the present.

The Board found that the Party invariably follows the views and policies of the Soviet Union (Sec. 13(e)(2)). We have already discussed non-deviation as one of the chief items of evidence in the case.

The Board found, pursuant to Section 13(e)(3)), that, until the disaffiliation of the Party from the International, the Party received substantial financial aid from and at the direction of the Soviet Union and the International, but that since 1940 only one incident of such aid was shown by the record. The evidence in support of that finding is overwhelming. Indeed it is not seriously controverted. The Party's chief defense on this point is that the evidence is not relevant, a legal question we have discussed.

The Board found (Sec. 13(e)(4) and (5)) that prior to the outbreak of World War II the Party USA sent many representatives to the Soviet Union and they were trained there in Communist policies and program; and that there is no substantial evidence that such rep-

resentatives were sent after the outbreak of that war. The latter conclusion is not disputed, of course; the former is overwhelmingly established. However the Board found that the Party reports to the Soviet Union, largely through representatives of the Soviet in this country. The Party's witnesses categorically denied this claim as it was presented to the Board by the Attorney General. There is little doubt about these reports having been made when the Party was a member of the International; such was one of the "conditions" of the International. There is some doubt that a preponderance of the evidence supports the broad conclusion that the Party "reports to the Soviet Union and its representatives." Such a conclusion seems to imply constant, systematic reporting as of now. The evidence indicates instances, as in the cases of Eisler and Peters. On this record we would strike this finding as phrased. There is a preponderance of evidence, we think, to support a conclusion that upon occasion leaders of the Party report to representatives of the Soviet Union.

The Board, pursuing Section 13(e)(6), found that an iron discipline exists throughout the world Communist movement, which requires unquestioned devotion to the program laid down by the Soviet Union, and that the Party has recognized and accepted that requirement. The Party's witness Gates denied that the leaders of the Party USA consider themselves subject to the disciplinary power of the Soviet Union or of any international Communist agency.

The requirement of iron discipline within the Communist movement is one of the basic principles of the movement. It is the "democratic centralism" so vigorously insisted upon by Communist leaders in both speeches and documents. The evidence offered by the Government upon the point included the Classics, many publications, categorical assertions by witnesses on the

stand, and incidents in which those who departed from the Communist program were expelled from the Party, including, among others, the experiences of Gitlow in 1929, Kornfeder in 1934, Johnson in 1940, Lautner in 1950, Tompkins in 1951, and the demotion of Browder in 1945. Identification of the Soviet Union as the leader of the world Communist movement is amply shown. It appears in documents taught in Party classes, in Communist publications, in oral testimony, and in circumstances such as the pledge of fidelity to Stalin by the International convention. We think the finding on this point is supported by a clear preponderance of the proof.

With respect to operations on a secret basis, referred to in Section 13(e)(7) of the Act, the Board made findings on a number of such practices, including concealed membership, refusal to reveal information, secretion of records, deceptive language, the use of aliases, the use of codes, false swearing, secret meetings, reduction of committee memberships, assignment of members to small groups, underground plans and operation, and the infiltration of other organizations. There is no serious dispute as to the facts in respect to these operations. Indeed the Party's witnesses testified to many of them, and the amended answer impliedly admits them. The dispute centers about the purposes of the practices. The Party contended, and now contends, that it was forced into these practices in order to protect the constitutional rights of its members to speak and to assemble, and to safeguard them from social and economic persecution. The Government says that these practices were for the purpose of concealing an unlawful conspiracy. The Board concluded that the practices were undertaken for the purposes of concealing the true nature of the Party and of promoting its objectives.

This question, whether the secret practices of the Party are for the purpose of protecting the liberties of the members or are for the purpose of promoting the

objectives of the Party, is a nebulous one. The two purposes may well overlap. In so far as protection of its members from public identification as Communists also promotes the objectives of the Party, both purposes could exist together. In a doubtful situation such as that on this point, we strike the finding as to purpose. At the same time we are of opinion that the Party's view of the limited purpose of secrecy is not shown by a preponderance of the evidence. On this point we conclude simply that a defined purpose is not proven.

The Board found (Sec. 13(e)(8)) that the purposes of the Party are the antithesis of allegiance to the United States and that the Party's leaders and members consider the allegiance they owe the United States as subordinate to their loyalty and obligations to the Soviet Union. The evidence on this point is long and in great detail. Considerable testimony was given that at Communist schools students were taught that a just war is one in which the Soviet Union has as an adversary an imperialist power, that from the standpoint of a war against the Soviet Union the war is an unjust one for the adversary, and that Party members must adhere to the Soviet Union in any just war. Certainly it is clear beyond question that the Party USA regards the Government of the United States as an imperialist government, and the ultimate essence of the Communist movement is the overthrow of imperialist governments. Certainty prior to 1941 the leaders of the Party USA declared fealty to the Soviet rulers, and the same men are now leaders of the Party. *The Communist Party Manual on Organization*, written by J. Peters and published by the Workers Library Publishers, contains this statement:

> "The Communist Party rallies the masses against imperialistic war and fascism, and for the defense of the Soviet Union.
>
> "The Soviet Union is the only fatherland of workers all over the world. * * *"

Certainly it appears that the Communists bitterly assail the Socialists for advocacy of a peaceful path to power. Repeatedly in Communist publications appears the phrase "the Workers' Fatherland, the Soviet Union," or similar phrases.

The Party relies chiefly upon the text of its constitution and the testimony of the three witnesses whom it presented. The witnesses denied that they owed allegiance to any government except the United States.

The use of the term "allegiance" in connection with a relationship to the Soviet Union injects some confusion into the discussion upon this point. Allegiance implies the formalities of the oath of citizenship, the necessities of military service, etc. Of course citizens of the United States have no such "allegiance" to the Soviet. But the statute itself is not confused upon the matter. It refers to the extent to which members of an organization "consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization." The latter are obligations of a nature different from technical allegiance. The Board accurately phrased the point in its key considerations, saying that the obligations which members have accepted toward the Soviet are completely incompatible with, and the exact antithesis of, allegiance to the United States. We think the conclusion is amply supported.

This opinion is too long to permit of recapitulations. The foregoing recitations will reflect the state of the facts as we find the controlling features to be shown by the record. When the parts are put together, the picture is clear and forceful.

XV

We are of opinion, as hereinabove indicated, that the statute and the order are valid as matters of law. The ultimate finding of the Board was that the Party USA "is substantially directed, dominated and controlled by

the Soviet Union, which controls the world Communist movement referred to in Section 2 of the Act; and that Respondent [the Party] operates primarily to advance the objectives of such world Communist movement." We conclude that this ultimate finding is supported by the basic findings which are in our opinion supported by a preponderance of the evidence, and that the ultimate finding is itself supported by a preponderance of the evidence.

The order of the Board will be

Affirmed.

BAZELON, *Circuit Judge*, dissenting: Suppose an Act of Congress required bands of bank robbers to file with the Attorney General statements of their membership and activities, and imposed criminal penalties upon their leaders and members for failure to do so. Such an Act would compel individuals to disclose their connection with a criminal conspiracy. No argument could reconcile such an Act with the Fifth Amendment's command that "No person * * * shall be compelled in any criminal case to be a witness against himself."

The registration provisions of the Internal Security Act of 1950 are similar.[1] They compel individuals, under

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[1] In 1951, sitting as a member of a three-judge District Court, I voted to deny the motion of the Communist Party for a preliminary injunction. 96 F.Supp. 47. The relief sought by that motion was a stay of the proceeding which the Attorney General had theretofore instituted before the Subversive Activities Control Board. I based denial of discretionary preliminary relief upon a series of estimates of probabilities, which was all we had before us. The Communist Party pointed to nothing in the conduct of the administrative proceedings themselves which would necessarily violate constitutional rights. The issue of coverage remained to be determined by the Board, which might have

criminal penalties, to disclose intimate association with the Communist Party, a disclosure which the Supreme Court has held to be incriminatory.[2] Every "Communist-action" organization must register with the Attorney General,[3] list the names, aliases, and addresses of its members and officers during the preceding twelve months, and account for all money received and spent during that time.[4] The organization must register within thirty days after a final order of the Board,[5] under a penalty of $10,000 for each day's delay.[6] In addition, if it fails to register, § 7(h)[7] requires certain officers to register on its behalf.[8] If the officers do not register within sixty days after the final Board order, § 8(a) requires all individual members to register.[9] Noncompliance by individuals with either § 7(h) or § 8(a) is punishable by a

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found that the Communist Party was not a Communist-action organization, and there was nothing in the administrative procedure or in the provision for judicial review which indicated that they were unconstitutional on their face. Since the Communist Party has now been found to be a Communist-action organization, the questions posed now are different. Because they are different, as Mr. Justice Jackson said, quoting Baron Bramwell, "The matter does not appear to me now as it appears to have appeared to me then." Kristensen v. McGrath, 340 U.S. 162, 178 (1950) (concurring opinion.)

[2] Blau v. United States, 340 U.S. 159, 161 (1950).

[3] Section 7(a), 50 U.S.C. § 786(a) (1952).

[4] Section 7(d), 50 U.S.C. § 786(d) (1952).

[5] Section 7(c), 50 U.S.C. § 786(c) (1952).

[6] Section 15(a)(1), 50 U.S.C. § 794(a)(1) (1952).

[7] 50 U.S.C. § 786(h) (1952).

[8] Section 11.205 of the regulations promulgated under the Act supplements the list of officers who must register. 19 FED. REG. 6035-36 (Sept. 18, 1954).

[9] 50 U.S.C. § 787(a) (1952).

fine of $10,000, five years' imprisonment, or both, for each day's delay.[10]

The registration of the organization, required by § 7(a), must necessarily be executed by some individual or individuals. Congress and the Attorney General have recognized this obvious fact. Section 15(b)[11] punishes "individuals" who willfully falsify or omit a required fact in executing a registration statement required under § 7;[12] and paragraph 6 of the Attorney General's instructions which accompany the registration form for organizations (Form ISA-1) requires the statement to "be signed by the partners, officers, and directors, including the members of the governing body of the organization."

My colleagues recognize that some individual will be "called upon to sign or swear to a registration statement" and may be ineriminated by having to disclose his aliases.[13] But they fail to recognize that his signing is a complete though tacit admission that he knows the names of the Party's officers and members, and its organization; that he is himself a member or a confidential employee of the Party; and that he has access to Party books and records. *Blau* v. *United States* is decisive of this case. The Supreme Court there held that an admission that one is "employ[ed] by the Communist Party or [has] intimate knowledge of its workings" might furnish

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[10] Section 15(a)(2), 50 U.S.C. § 794(a)(2) (1952).

[11] 50 U.S.C. § 794(b) (1952).

[12] See Note, *The Internal Security Act of 1950*, 51 COL. L. REV. 606, 620 (1951), where the author states: "It is obvious * * * that an organization cannot register unless its officers, or other persons designated by the membership, execute a registration statement and continue to make the necessary annual reports."

[13] Majority Opinion, p. 24.

a "link in the chain of evidence needed in a prosecution" under the Smith Act and therefore could not be required.[14]

It is true that the present Act does not in direct terms require any individual to execute a statement for the organization during the thirty-day period within which it must register. But of necessity and also by the Attorney General's instructions, the only individuals who can execute a statement for the organization are those upon whom § 7(h) of the Act, supplemented by § 11.205 of the Regulations, places a duty to register for the organization if it defaults;[15] and these officials are subject to the

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[14] 340 U.S. 159, 161 (1950). The admissions implied in executing the statements for the Communist Party are the very admissions sought from Mrs. Blau: "Mrs. Blau, do you know the names of the State officers of the Communist Party of Colorado?" "Do you know what the organization of the Communist Party of Colorado is, the table of organization of the Communist Party of Colorado?" "Were you ever employed by the Communist Party of Colorado?" "Mrs. Blau, did you ever have in your possession or custody any of the books and records of the Communist Party of Colorado?" "Did you turn the books and records of the Communist Party of Colorado over to any particular person?" "Do you know the names of any persons who might now have the books and records of the Communist Party of Colorado?" "Could you describe to the grand jury any books and records of the Communist Party of Colorado?" *Id.* at 160, n. 1. See cases collected 19 A.L.R. 2d 388.

[15] Under the statute the duty to register falls upon the organization's executive officer, secretary, or the individuals performing the ordinary and usual duties of such officers, and upon such other officers as the Attorney General may prescribe. Under the regulation, "(a) The president, chairman, or other person who is chief officer of the organization. (b) The vice-president, vice-chairman, or person performing similar function. (c) The treasurer. (d) Members of the governing board, council, or body" "jointly with the executive officer and secretary" are made liable to register for the organization after the expiration of thirty days. It

severe criminal penalties of § 15(a)(2)[16] if they fail to perform this duty. Since they will be subject to criminal penalties for failure to register shortly after the thirty-day period has run,[17] as a practical matter they are under heavy pressure to prevent it from running.[18] The "compulsion prohibited by the fifth amendment is not alone physical or mental duress, such as comes from unlawful commands and authoritative orders * * *,"[19] "the test being whether all things considered the testimony in question was voluntarily given."[20]

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will be recalled that paragraph 6 of the Attorney General's instructions specifies that the organizational registration form shall be signed by the organization's "partners, officers, and directors, including the members of the governing body * * *."

[16] The officers are subject to a fine of $10,000 and imprisonment of five years for each offense. Any offense is defined as one day's failure to register, so that two weeks' nonregistration could mean a fine of $140,000, seventy years in prison, or both.

[17] The designated officers must file the statement within ten days after the organization's thirty-day period has run. Regulations, § 11.205, 19 FED. REG. 6036.

[18] Cf. United States v. Bell, 81 Fed. 830, 837 (W.D.Tenn. 1897), where it was held that a witness, although "technically not under the compulsion of a subpoena," had nevertheless been under compulsion in testifying before an "official having the power to compel him to come, if he should be recalcitrant about it * * *."

[19] United States v. Bell, 81 Fed. 830, 837 (W.D.Tenn. 1897); cf. Boyd v. United States, 116 U.S. 616, 621-22 (1886) (holding that it is equivalent to the compulsory production of papers to make their nonproduction a confession of the allegations it is contended they will prove); and see McKnight v. United States, 115 Fed. 972, 981 (6th Cir. 1902).

[20] United States v. Neff, 212 F.2d 297, 312 (3d Cir. 1954).

Nor are the compulsory self-incrimination provisions of the Act saved by § 4(f). That section provides that "*the fact of registration* of any person • • • *shall not be received in evidence* • • • in any prosecution for any alleged violation of subsection (a) or subsection (c) or for any alleged violation of any other criminal statute."[21] Since this provision merely bars the "fact of registration" as evidence, and leaves the registrant exposed to prosecution for everything to which the registration relates, it does not meet the command of the Supreme Court in *Counselman* v. *Hitchcock*. There, as here, a statute prevented use of extorted disclosures as "evidence" in any criminal proceeding but, as the Court pointed out, the statue did not prevent their use "to search out other testimony to be used in evidence • • • in a criminal proceeding." No grant of immunity is sufficient unless it provides "complete protection from all the perils against which the constitutional prohibition was designed to guard."[22] Nothing less than "absolute immunity against future prosecution for the offence to which the question relates" can serve as a "full substitute for that [constitutional] prohibition."[23]

But my brethren say, in effect, that under the doctrine of *United States* v. *White*,[24] no officer of the Communist Party can assert the constitutional privilege to avoid giving information about the organization which § 7(a)

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[21] 50 U.S.C. § 783(f) (1952); emphasis supplied.

[22] 142 U.S. 547, 564, 585-86 (1892).

[23] *Ibid.* For law review comment asserting the purported immunity to be inadequate, see Meltzer, *Required Records, The McCarran Act, and the Privilege against Self-Incrimination*, 18 U. OF CHI.L.REV. 687, 724 (1951); Comment, *Communist Registration under the McCarran Act and Self-Incrimination*, 1951 WIS.L.REV. 704, 715 (1951).

[24] 322 U.S. 694 (1944).

requires. I do not think the *White* doctrine can be so applied.

In *White* an officer of a labor union had appeared before a grand jury in response to a *subpoena duces tecum* but had declined to produce union documents. His mere appearance as a union officer was not, and was not claimed to be, incriminatory. Instead, he invoked the privilege on the theory that the demanded documents were incriminating. The Court replied that he could not "place under the protective shield of the privilege * * * official union documents held by him in his capacity as a representative of the union." [25] The vice of the present statute is not that it compels someone to produce incriminatory documents, but that it *compels someone to identify himself as a Communist Party functionary.* Such identification, unlike identification as a corporate or union official, is incriminatory under the *Blau* case.[26] That situation was not involved in *White*; nor in *Rogers* v. *United States*, since the witness there had "freely described her membership, activities and office in the Party." [27] This fundamental difference makes the *White* case inapplicable. There are two further distinctions.

(1) Section 7(d) requires the *preparation of a statement* naming the organization, listing its members and officers (and their aliases), describing the officers' duties and functions, and accounting for money received and

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[25] *Id.* at 704.

[26] See n. 14 and text, *supra.*

[27] 340 U.S. 367, 372 (1951). In United States v. Field, 193 F.2d 109 (2d Cir. 1951), an official of the Bail Fund Committee of the Civil Rights Congress declined to produce the organization's documents on the ground that to do so would in itself be incriminatory. The argument was rejected by the Second Circuit solely on the ground that earlier, in the same proceeding, he had admitted being a trustee of the fund.

spent. Hence incriminating information is, in effect, "forced from the lips of the [executing officer], rather than obtained from the records or books." [28] As the Second Circuit has held, "the production of records must be distinguished from * * * testimony as to what the records would contain, had they been produced." [29]

(2) I do not think the *White* doctrine applies even as to books and records of the Communist Party, notwithstanding the dictum in *Rogers* that there is no privilege with respect to the books of the Party. Under the *White* test, the privilege is unavailable to officers of an organization only when the organization's character is "so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." [30] The "impersonal" criterion, as discussed by the Court, clearly indicates that unions, other lawful associations, and corporations are to be distinguished from

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[28] United States v. Daisart Sportswear, 169 F.2d 856, 862 2d Cir. 1948). See Note, *The Internal Security Act of 1950*, 51 COL.L.REV. 606, 621 (1951), where the author states: "The execution of a registration statement by an individual would at least require him to confirm and transpose selected material from the organization's records to the registration statement. Since an organization need not keep complete records prior to registration, in many cases the officer would be forced to execute the registration statement by relying on his own knowledge. It is clear that in both instances the officer is doing more than producing records and identifying them. He is disclosing other matters of his personal knowledge."

[29] 169 F.2d at 862.

[30] 322 U.S. at 701.

criminal conspiracies.[31] Only by ignoring the history of the decade since *White* can the Communist Party be equated to an ordinary corporation, union or association. For in that decade it has been established that officers of the Communist Party are engaged in a conspiracy to violate the Smith Act.[32] Since these officers, unlike the officers of "impersonal" organizations, are co-conspirators, bound by the acts of other officers in pursuance of the conspiracy and subject to criminal penalties for such acts, the *White* case does not touch the self-incrimination problems posed by this Act.

In *Boyd* v. *United States*[33] the Supreme Court declared "unconstitutional and void" a statute which merely imposed economic pressure to produce incriminating documents. State courts have invalidated various statutes that compelled self-incrimination,[34] including two that re-

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[31] In finding unions similar to corporations, the Court enumerated features common to both which are clearly inapplicable to criminal conspiracies: "Duly elected union officers have no authority to do or sanction anything other than that which the union may lawfully do"; "no member or officer has the right to use [the union's books and records] for criminal purposes * * *"; "the actions of one individual member no more bind the union than they bind another individual member unless there is proof that the union authorized or ratified the acts in question"; and "the members are not subject to either criminal or civil liability for the acts of the union or its officers as such unless it is shown that they personally authorized or participated in the particular acts." 322 U.S. at 702.

[32] Dennis v. United States, 341 U.S. 494, 516-17 (1951); Frankfeld v. United States, 198 F.2d 679 (4th Cir. 1952).

[33] 116 U.S. 616, 638 (1886).

[34] In re DeWar, 148 A. 489 (Vt. 1930) (statute requiring persons convicted of intoxication to disclose name of person from whom liquor obtained held "unconstitutional and void"); People v. Reardon, 90 N.E. 829 (N.Y. 1910) (statute

quired members of the Communist Party to register,[35] I would do the same with the present statute. Section 14(a)[36] permits a "party aggrieved" by respondent's order to obtain judicial review. Plainly the Communist Party is "aggrieved." Therefore it may challenge the legality of the Board's order even though the constitutional rights invaded are those of other persons and not of the Party itself.[37]

The Government and my brethren would postpone determination of constitutionality until a Communist Party official has declined to register for the Party on self-incrimination grounds. First, they say that an official may register voluntarily. But as I have pointed out, the coercion to register precludes voluntary compliance as a matter of law. In *Boyd* the Supreme Court held a statutory disclosure requirement "void" although, theoretically at least, someone within its scope might at some time have voluntarily made the required disclosures. Second, they argue that a Communist Party official might suffer no "substantial detriment" either because he had already disclosed his Communist affiliations in other proceedings or because he had already been convicted under the Smith Act. But the privilege can never be lost in any such

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compelling individual to submit to investigation of books and papers kept in private business for purpose of furnishing evidence in criminal prosecution held to violate self-incrimination clause of State constitution); State v. Simmons Hardware Co., 18 S.W. 1125 (Mo. 1892) (statute requiring officers of every corporation to inform Secretary of State whether company is violating State anti-trust law held void).

[35] People v. McCormick, 228 P.2d 349 (Cal. 1951); Maryland v. Perdew, 19 U.S.L. WEEK 2357 (Md. C.C., Allegany Cty., 1951).

[36] 50 U.S.C. § 793(a) (1952).

[37] National Coal Ass'n v. Federal Power Comm'n, 89 U.S.App. D.C. 135, 191 F.2d 462 (1951); Associated Industries v. Ickes, 134 F.2d 694 (2d Cir. 1943).

way. "The privilege is not waived by testimony given in a previous proceeding, even in the same case." [38] It is waived only by testimony in the same proceeding. Hence the individuals referred to by my brethren as having admitted Communist Party affiliations at the hearing before the Board did not thereby waive their privilege.[39] And the previous conviction of some Communist Party officials confers no immunity upon them from further prosecution based upon later Communist affiliation. Third, it is urged that the privilege "must be specifically asserted at the time a particular question is asked * * *." [40] But that doctrine applies only where it is not plain from the inquiry itself that incriminating disclosures are de-

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[38] United States v. Steffen, 103 F.Supp. 415, 417 (N.D. Cal. 1951); see also Marcello v. United States, 196 F.2d 437 (5th Cir. 1952); United States v. Field, 193 F.2d 109 (2d Cir. 1951); United States v. Peckhart, 103 F.Supp. 417 (N.D.Cal. 1952); United States v. Malone, 111 F.Supp. 37 (N.D.Cal. 1953) (waiver before grand jury held not to bar privilege at trial on indictment returned by same grand jury); Note, 36 A.L.R. 2d 1403 (1954). Other state authorities are collected in United States v. Steffen, *supra*, 103 F. Supp. at 417, n. 4. See WIGMORE § 2276(4) (3d ed. 1940).

[39] In the three-judge court suit brought by the Communist Party (see n. 1, *supra*), one of the grounds urged for enjoining hearings before the Board was that to properly defend itself at such hearings Communist Party officials would necessarily have to testify and that such testimony would necessarily entail their admission of Communist Party affiliations. Those officials who testified at the hearing did so only after denial of relief in that suit. Moreover, they testified more than two years ago. A fresh disclosure of continued Party office would clearly constitute a "substantial detriment," particularly in view of the intervening Board determination that the Party is a Communist-action organization.

[40] Brief for Government, p. 56.

manded.[41] It is plain here. Since any person who comes forward, even to claim the privilege, thereby identifies himself as a Communist Party functionary,[42] to require him to claim the privilege would, in the words

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[41] In a judicial or legislative proceeding, where most questions asked will not necessarily require incriminating answers, the tribunal must be put on notice that in a particular instance the Fifth Amendment may apply. See, *e.g.*, Vajtauer v. Commissioner, 273 U.S. 103, 113 (1927), where the Court said: "It is for the tribunal conducting the trial to determine what weight should be given to the contention of the witness that the answer sought will incriminate him, *a determination which it cannot make if not advised of the contention.* The privilege may not be relied on and must be deemed waived if *not in some manner fairly brought to the attention of the tribunal which must pass upon it.*" [Emphasis supplied.] Similarly, under a revenue statute requiring all taxpayers to give information about their sources of income either in a return or an investigation, the enforcing authorities must be put on notice that as to a particular taxpayer the Fifth Amendment may bar the required disclosure. See United States v. Sullivan, 274 U.S. 259, 263 (1927), where the Court said: "If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all." The matter was well expressed by the Seventh Circuit in Murdock v. United States, 62 F.2d 926, 927 (1932): "* * * a citizen from whom information is sought under a statute enacted pursuant to authority granted to Congress by the Sixteenth Amendment may invoke or waive the protection provided by the Fifth Amendment. And likewise the courts will compel the production of information, *subject, however, to the right of said taxpayer to justify his refusal so to do by showing facts that bring him within the protection of the Fifth Amendment.* Thus construed, the statute under consideration is not unconstitutional." [Emphasis supplied.]

[42] This is so because the only persons within the class required to act are Communist functionaries. As in the case of the hypothetical bank robber statute, to claim the privi-

of Chief Justice Marshall, "strip him of the privilege which the law allows * * *."[43]

In reviewing administrative action, the court "may adjust its relief to the exigencies of the case in accordance with equitable principles governing judicial action."[44] Equitable principles, even in the absence of a statute providing for judicial review, justify the relief I would grant in this case. *Truax* v. *Raich* is in point. There the complainant was an alien employee who was threatened with discharge because of a state statute which penalized only the employer for employing more than a certain percentage of aliens. It did not penalize employees. The Supreme Court held the threatened injury to the complainant brought the case "within the class in which, if the unconstitutionality of the act is shown, equitable relief may be had."[45] And Government officers have been enjoined "from bringing criminal proceedings to compel obedience to unconstitutional requirements."[46]

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lege is to admit that one is within the class to which the statute relates.

[43] United States v. Burr, 25 Fed.Cas. 38, 40, No. 14692(e) (C.C.Va. 1807); see also Hoffman v. United States, 341 U.S. 479, 486 (1951), where the Court declared: "* * * if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee."

[44] Ford Motor Co. v. National Labor Relations Board, 305 U.S. 364, 373 (1939); United States v. Morgan, 307 U.S. 183, 191 (1939); see Davis, ADMINISTRATIVE LAW 727 (1951).

[45] 239 U.S. 33, 39 (1915). See also Terrace v. Thompson, 263 U.S. 197 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[46] Philadelphia Co. v. Stimson, 223 U.S. 605, 621 (1912). See also Ex parte Young, 208 U.S. 123 (1908); and cases cited n. 45, *supra*.

Since Congress has enlarged the area of incrimination with regard to the Communist Party, and since the Supreme Court has found the enlargement permissible, we must see that the constitutional guarantee against compulsory self-incrimination is co-extensive with the widened danger.

The Fifth Amendment, as Dean Griswold has said, "is a clear and eloquent expression of our basic opposition to collectivism, to the unlimited power of the state. It would never be allowed by Communists, and thus it may well be regarded as one of the signs which sets us off from Communism." [47]

Since I would void the Act on Fifth Amendment grounds, I do not consider the petitioner's other contentions.

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[47] Griswold, *The Fifth Amendment As a Symbol*, HARV. LAW SCHOOL RECORD (Oct. 21, 1954).

Opinion of January 9, 1958

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11850

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD,
Respondent.

On Petition for Review of Order of the Subversive Activities Control Board and on Further Hearing Following Further Proceedings before the Subversive Activities Control Board on Remand Pursuant to the Judgment of the Supreme Court.

Decided January 9, 1958

Before PRETTYMAN, BAZELON and DANAHER, Circuit Judges.

PRETTYMAN, *Circuit Judge*: This is the second time this case has been here. After our decision upon the first petition [1] the Supreme Court ordered the case remanded

[1] *Communist Party of U. S.* v. *Subversive Activities Control Board*, 96 U. S. App. D. C. 66, 223 F. 2d 531 (1954).

to the Subversive Activities Control Board for reconsideration under Section 14(a) of the Subversive Activities Control Act [2] in the light of allegations that the testimony of three witnesses, Crouch, Johnson and Matusow, who had testified for the Government at the original hearing, was perjured.[3] The Board struck the testimony of those witnesses and issued a Modified Report and an order based thereon. The Party petitions for review of that order.

I

The Party renews all the points of law it presented upon its first petition to this court. Upon reexamination we adhere to, and now reaffirm, the views we expressed in our opinion in that case.

II

Section 3(3)(a) of the Act [4] provides:

"SEC. 3. For the purposes of this title—

* * *

"(3) The term 'Communist-action organization' means—

"(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign gov-

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[2] 64 Stat. 1001 (1950), 68 Stat. 780 (1954), 50 U. S. C. A. §793(a).

[3] *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, 100 L. Ed. 1003, 76 S. Ct. 663 (1956).

[4] 64 Stat. 989, 50 U. S. C. A. §782(3)(a).

ernment or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; * * *."

In the language of this litigation the foregoing definition is said to have two components, a control component and an objective component. The Party says the findings of the Board are not supported by a preponderance of the evidence, in that the evidence does not support the finding as to control within the meaning of the control component and does not support the finding as to objectives within the meaning of the objectives component. The point rests upon a construction of the quoted section of the statute.

The Party says the control component means a relationship in which the Soviet Union exercises an enforceable power to exact compliance with its demands, and the Party adds of course that there is no showing that the Soviet has any means of enforcing conformity by the Party with Soviet desires. But we think this construction of the statute would be erroneous. In the first place, and conclusively, Section 13(e) of the statute [5] makes the matter clear. That section says: "In determining whether any organization is a 'Communist-action organization', the Board shall take into consideration" a list of eight subjects. Among these items are such things as "the extent to which its views and policies do not deviate from those of such foreign government" and "the extent to which it reports to such foreign government". These items demonstrate that the definition of a Communist-action organization was not intended by the Congress to be restricted to organizations which are subject to enforceable demands of the Soviet Union. In the second place the words of Section 3(3) do not necessarily imply enforceable power. The words are "substantially directed, dominated, or con-

[5] 64 Stat. 999, 50 U. S. C. A. § 792(e).

trolled". The statute uses the word "substantially". An organization or a person may be substantially under the direction or domination of another person or organization by voluntary compliance as well as through compulsion. This is especially true if voluntary compliance is simultaneous in time with the direction and is undeviating over a period of time and under variations of direction. If the Soviet Union directs a line of policy and an organization voluntarily follows the direction, the terms of this statutory definition would be met.

As to the objectives component of the definition the Party says this clause in the statute requires proof that the accused organization operates primarily to advance three objectives: (1) overthrow of the Government by any means necessary, including force and violence, and (2) establishment of a Communist totalitarian dictatorship, which (3) will be subservient to the Soviet Union. The Party says the Board found only the first of these three objectives and that its finding is not supported by the evidence and is based in large part on misrepresentations of the evidence. The Party derives its construction of the objectives component by analyzing Section 2 of the statute. That section is a recitation of fifteen findings made by the Congress. In these fifteen findings the Party discerns findings as to the objectives of the world Communist movement. As thus discerned the Party describes these objectives in three parts, as we have just indicated.

The Board clearly concluded in the affirmative on each of the foregoing objectives. See its Modified Report [6] at pages 39, 89-90, 194-202, 204. Its conclusions were clearly supported by a preponderance of the evidence. It would prolong this opinion beyond permissible length even to sketch that evidence. It is referred to at length in the Modified Report. So, even if we accept the Party's analysis of Section 2—we intimate no opinion upon whether

[6] Available from the Government Printing Office.

or not that analysis is accurate—we think the objectives component of the definition of a Communist-action organization has been met.

III

The Party says the Board's finding with reference to a world Communist movement, if authorized by the Act, is not supported by the evidence. By "if authorized by the Act" the Party is referring to the section of the Act (Section 2) which contains a congressional finding upon the existence and characteristics of the world Communist movement. The Party says that in view of that finding the subject may not be litigated. We discussed that matter in our former opinion. The finding made by the Board is, in our view, supported by ample evidence in this record. So, whether that finding is superfluous or not, the fact is established, either by the congressional finding or by the Board finding, or by both.

IV

The Party says that the order of the Board must be set aside because the Board refused to require production of alleged reports made to the Federal Bureau of Investigation by Government witnesses. Reports said to have been made by four witnesses—Scarletto, Gitlow, Budenz and Markward—are involved. The Party moved for the production of these reports both at the original trial and at the hearing after remand.

Scarletto.

The Board affirmatively stated that Scarletto's testimony was not credited. It said:

> "Relevant to this issue petitioner's witness Scarletto testified concerning a meeting of a Party club where sabotage of United States efforts in the Korean War were discussed, however, this testimony was rendered questionable on cross-examination and is not credited."

The Party's objective in demanding production of Scarletto's alleged report to the F.B.I. was to impeach him as a witness. Since the Board did not credit the testimony that objective was achieved. The Party accomplished the full purpose it sought from the production of the report. We need therefore consider this point no further.

Gitlow.

Gitlow was for years a high official of the Communist Party—a member of the Executive Committee of the Communist Internationale, a member of the Executive Committee of the Profintern, and head of American delegations to Moscow in 1928 and 1929. In 1929 he was expelled from the Party because of a difference with Joseph Stalin on the question of the leadership of the American Communist Party. Over a decade later, in about 1940, Gitlow turned over to the F.B.I. all documents and papers in his possession pertaining to the Party, including a quantity of minutes of meetings of top committees. A few weeks later he dictated for the F.B.I., over a period of weeks, memoranda explaining and interpreting those documents.

Gitlow was not at any time an employee of the F.B.I. He never at any time made to the F.B.I. contemporaneous reports of events.

Much of Gitlow's direct testimony before the Board consisted of his identification of documents which he had delivered to the F.B.I. He explained those documents on the witness stand.

While Gitlow was testifying before the Board he was shown a document, which he said was a copy of his interpretation of certain minutes and documents which he had submitted to the F.B.I. He was asked whether this document refreshed his recollection. He replied that it did not—"Not at all." The Government gave counsel for the Party the memorandum with which the Government attempted to refresh the witness's recollection. The dispute here concerns the remaining memoranda.

The Party moved that the Attorney General be directed to produce for the inspection of the Party the so-called explanatory memoranda.

The problem posed is this: Where a witness, approximately contemporaneously with turning over to the F.B.I. quantities of minutes of Party meetings, wrote for the F.B.I. interpretations and explanations of those documents, and the witness testified before this Board at length in explanation of the same documents, must his explanatory memoranda be produced upon request?

The first point here concerns the status of the documents involved; they are official possessions of the F.B.I. The Government repeatedly urges that they are confidential. Only in its brief here, and only in one sentence, does it claim they are privileged. There is a vast difference between confidential and privileged. Almost any communication, even an ordinary letter, may be confidential. Such a document may not relate to any matter of high public concern. But privileged means that the contents are of such character that the law as a matter of public policy protects them against disclosure. A communication from a person to his banker may be confidential, but it is not privileged; certain of his communications to his doctor or his lawyer are not only confidential but also privileged; the law does not permit their disclosure even under *subpoena* by a court. So, too, with Government documents. Some are privileged, such, for example, as the President's advices in the conduct of foreign affairs and some papers relating to the internal security of the nation.

The Government did not claim before the Board in the present proceeding that the documents here involved are privileged. No factual allegations as to privilege have been made. We cannot consider an unsupported claim made only in the brief here that the doctrines of privilege apply. That the documents are merely confidential does not protect them against compulsory disclosure. Of course this does not mean such documents must be produced upon

every demand; good cause for intrusion into confidential files and materiality and relevancy must be shown. The law in that area is well settled.

We must next consider the contention of the Government that the Party has waived its right to the Gitlow memoranda. The Gitlow testimony and its accompanying incidents occurred at the original hearing before the Board. The production of the explanatory memoranda was demanded at that time. In its petition for review in this court the Party asserted error (No. 14 of grounds for relief) in the refusal of the Board to order production of documentary evidence but without specification of that evidence. In its brief the Party asserted the point as question number 5. It does not refer us to any place in the argument portion of its brief on that appeal where the production of the Gitlow memoranda was mentioned, and we find none. The matter seems not to have been mentioned in the Supreme Court.

The Government argues that failure to raise the point in the Supreme Court spells abandonment of the point by the Party. We do not think so. Rule 23(c) of the Rules of the Supreme Court provides for a statement of the questions presented for review. It provides that the statement of a question will be deemed to include every subsidiary question "fairly comprised therein" and that only such questions will be considered by the Court. But that seems to us not to be a basis for concluding that all questions not stated or "fairly comprised" in a statement are abandoned. To be sure, if a judgment is affirmed by the Supreme Court, all questions presented and all which might have been presented are *res judicata*. But, if the judgment is reversed or vacated on a single point (*e.g.*, a constitutional question and the only point presented to the Court), other claims of error are not foreclosed upon a retrial or reconsideration upon a general remand. Of course, if the Supreme Court reverses and directs that a certain final judgment be entered, the whole controversy

is ended. We are here considering a reversal or vacation with a remand, as, for example, "for further proceedings in accordance with this opinion." Such a remand, or a general unqualified remand, means that the appellate court and trial court are to reconsider the case on all other points. Those points remain open after the Supreme Court's disposition of the case before it. By way of illustration, if an appellant urges six errors in this court, one of which is a constitutional question, and being unsuccessful here goes to the Supreme Court on that one point and is there successful, he is not precluded from urging his view of the correct ruling on his other points when he again tries or argues his case in the appellate or trial court. If this were not so, almost every petition to the Supreme Court would be burdened with a plethora of "questions presented" in which the Court has no interest and should have none. We think the Party did not abandon points raised in this court but not mentioned in the Supreme Court.

So the problem becomes this: Did the Party abandon this point when it stated the point in its petition for review and its brief but did not argue it here? We think a party in this court does not abandon points noted in both his petition and his brief but not argued. He takes a calculated risk. If the judgment is affirmed here, all points which are raised or which could have been raised are closed to further controversy. But if the judgment is reversed on one point the other points, preserved by notation, remain available for further contest. We conclude that the Party did not abandon its contention in respect to the Gitlow memoranda.

The Government next argues that, when the Board first refused production of the memoranda, the Party had a remedy and that remedy was exclusive. It was to apply to this court for leave to adduce additional evidence, *i.e.*, the memoranda, under Section 14(a) of the statute.[7] That

[7] *Supra* note 2.

section provides: "If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem proper." The Government relies upon *Consolidated Edison Co.* v. *National Labor Relations Board.*[8] We agree that we are bound by that case. The facts there were that when the Government rested its case before the Board the Company announced it would present two witnesses. It did so and then proffered two more witnesses, present in the hearing room, whose testimony would be material but short. The examiner rejected the proffer. In the Court of Appeals for the Second Circuit the Company urged that the rejection was error amounting to denial of due process. That court said:

> "These witnesses were at hand, their testimony would have been short, and would have entailed no appreciable delay in closing the hearings. It was vital testimony on the issue of the petitioners' motive in discharging him. Denial of leave to introduce it appears to us unreasonable and arbitrary. However, the petitioners have not applied to this court for the taking of additional evidence, as they might under section 10(e), 29 U.S.C.A. § 160(e)."[9]

The court did not consider the point further and directed enforcement of the Board's order. In the Supreme Court the Company again presented the point, *inter alia.* The Court said:

> "* * * An offer of proof was made which showed the testimony to be highly important with respect to

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[8] 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206 (1938).

[9] *Consolidated Edison Co.* v. *National Labor Relations Board,* 95 F. 2d 390, 397 (1938).

the reasons for the discharge. It was brief and could have been received at once without any undue delay in the closing of the hearing.

"We agree with the Court of Appeals that the refusal to receive the testimony was unreasonable and arbitrary. Assuming, as the Board contends, that it had a discretionary control over the conduct of the proceeding, we cannot but regard this action as an abuse of discretion. But the statute did not leave the petitioners without remedy. The court below pointed to that remedy, that is, to apply to the Court of Appeals for leave to adduce the additional evidence; on such an application and a showing of reasonable grounds the court could have ordered it to be taken. § 10(e)(f). Petitioners did not avail themselves of this appropriate procedure."[10]

The Court did not discuss the point further and affirmed the Court of Appeals judgment with modification not material here.

As we read the opinion and decision in the *Consolidated Edison* case it means that, when proffered evidence is denied receipt by the trial tribunal in a case in which a statute similar to Section 19(e) of the National Labor Relations Act[11] applies, the profferor must apply to the appropriate United States Court of Appeals for permission to adduce the additional evidence; if he fails so to move he cannot successfully present the point on appeal. The rule applies even though the evidence is "highly important"

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[10] *Supra* note 8, 305 U. S. at 226.

[11] 49 Stat. 454 (1935), 61 Stat. 148 (1947), 29 U. S. C. A. § 160(e), reading in pertinent part: "If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript."

and is brief and immediately available and rejection of it is "unreasonable and arbitrary". Other courts have so read that opinion.[12]

It may be said that the ruling we have just outlined creates a right to interlocutory relief in such cases, to multiple appeals to the appellate courts, and gives no effect to the provision of the Labor Relations Act which requires that to secure permission to adduce additional evidence the movant must show "that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board". It may also be, as the Eighth Circuit has held,[13] that the petition for review in such a case should be treated as a motion to adduce the additional evidence. But if that were correct we do not see why the petition was not so treated in the *Consolidated Edison* case. There is much force to these various suggestions, and perhaps we misconstrue the opinion of the Supreme Court. But we are bound by the opinion as we read it.

The statute in the case at bar is substantially identical with the pertinent part of the statute involved in the *Consolidated Edison* case. The Party did not move in this court for permission to adduce additional evidence in the Gitlow memoranda.

The situation here differs somewhat from that in *Consolidated*. In that case the Company had its evidence ready to proffer. Here the Party must first secure the evidence by an order directed to the Government. But the Board on the remand refused to reopen this hearing to receive

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[12] *National Labor Relations Board* v. *Fairchild Engine & Airplane Corp.*, 145 F. 2d 214 (4th Cir. 1944); *National Labor Relations Board* v. *National Laundry Co.* 78 U. S. App. D. C. 184, 138 F. 2d 589 (D. C. Cir. 1943); *California Lumbermen's Council* v. *Federal Trade Comm'n*, 103 F. 2d 304 (9th Cir. 1939).

[13] *Mississippi Valley Structural Steel Co.* v. *National Labor Relations Board*, 145 F. 2d 664 (1944).

any additional evidence on Gitlow's credibility. The purpose of the request for production was to offer additional evidence of Gitlow's perjury. Without this as its purpose the Party could not obtain an order for production. If the evidence, even if produced, could not be got into the record, it need not be produced. So it seems to us that the right to adduce is a necessary prerequisite to an order of production. Thus we conclude that the rule of *Consolidated Edison* applies here. The converse can be argued, and the argument is not unreasonable. It can be said that the production of the documents is a necessary preliminary to a motion to adduce the evidence into the record; *i.e.*, the evidence cannot be proffered until it is in hand and its relevancy and materiality are shown to the satisfaction of the court, as the statute provides. But it seems to us this latter is not the correct view; it would mean that the Government could be required to produce documents which are not, or may not be, admissible in evidence; *e.g.*, if a record has been closed, an order of reopening ought to be made before an order of production is granted. When the statute says a movant must "show to the satisfaction of the court" that the evidence is material, it does not mean he must actually produce the evidence for the court to see; it means he must show that the evidence is in existence and what he expects to prove by it. We think, as we have indicated, that, where a proceeding is in such state that certain evidence for some reason cannot be put in the record without permission to do so, the permission must be obtained before compulsory process for production of the evidence is issued. We do not consider whether, if the motion to adduce were granted, the Government must then produce, inasmuch as this latter may involve questions of privilege, relevancy, etc.

We are of opinion that under the *Consolidated Edison* case the point respecting the refusal to order production of the Gitlow memoranda is not available to the Party

upon this petition for review. Its contentions in respect to these memoranda are rejected.

Budenz.

Budenz was a prominent member of the Party for ten years (1935-1945), being for part of that time the managing editor of the *Daily Worker*. The Party demanded the production of two alleged reports made by this witness to the F.B.I. The first report is alleged to have dealt with a so-called Starobin letter and the other with an alleged conversation between Budenz and a man named Weiner.

It appears that in May, 1945, Starobin, who was the foreign editor of the *Daily Worker*, sent a letter from San Francisco to that paper in New York. It was said to have disclosed that D. Z. Manuilsky, a representative of the Communist Internationale, conveyed either commands or advice to the American Communists concerning their policy and program. There appears to have been discussion in the letter concerning the attitude of the "French Comrades". After Budenz left the Party he went to the F.B.I. and had many conversations with representatives of that office concerning many matters involving the Party. Among other things he is said to have made an oral statement to the F.B.I. concerning the Starobin letter.

On the witness stand before the Board Budenz testified concerning the Starobin letter. The letter was not produced; the testimony as to its last whereabouts was that it was taken upon receipt to the "top floor" of the offices of the *Daily Worker*. Under cross-examination Budenz testified to an account of the letter which he had included in his book, *This Is My Story*. He also said he had testified on the same subject before the un-American Activities Committee. He could not recall specifically whether the advice transmitted by Starobin originated with the "French Comrades" or with Manuilsky. The Starobin letter was pertinent to the case before the Board upon the question

whether the Party received directives, etc., from Communist headquarters in Russia.

The Party demanded that the Attorney General produce "all reports made by this witness to the Federal Bureau of Investigation dealing with the so-called Starobin letter."

Budenz was at no time an agent of the F.B.I. There is no evidence or indication that he ever at any time made a written report to the F.B.I. concerning the Starobin letter. The position of the Party is premised upon the assumption that if Budenz talked to an agent of the F.B.I., as he said he did, the agent made some written report of the conversation. It is such a report, if there is one, that is involved here.

The second Budenz report dealt, as we have said, with an alleged conversation between him and one Weiner. Budenz was for a time (1937-1940) editor of the *Midwest Daily Record*, "a Communist-controlled, organized and financed newspaper". The paper had financial problems, and Budenz testified that he and Morris Childs, the leader of the Communist Party in Illinois, made a trip to New York for a conference with Robert William Weiner, who was then in charge of Communist Party funds. Budenz testified before the Board: "Childs asked him if we couldn't get some money from abroad." He testified that, in the terminology used very frequently in the Party, "abroad" meant Moscow. On cross-examination, Budenz was asked whether in any of his books, writings, or published testimony he had ever related the alleged conversation of Childs, Weiner and himself. Budenz replied that it was his remembrance that he had, somewhere, and then he added, "I certainly have told the Federal Bureau of Investigation about it." Counsel for the Party, cross-examining, said: "I didn't ask you about that. I didn't ask you what you told the Federal Bureau of Investigation. That is private."

The present position of the Party on this point is that, if Budenz did in fact tell the F.B.I. about the conversation, the agent to whom he spoke certainly made a written report of it. The Party demands production of that report, if there is one.

In respect to the two written reports sought in connection with the Budenz testimony, a query immediately arises because it is not shown there were any reports. Could the Attorney General be required to answer whether there were any such reports? Be that as it may, a dispositive fact is that if there were such reports they were not by Budenz; if these documents exist they are reports by agents recounting conversations with Budenz. Is the Party entitled to production, for impeachment purposes, of written accounts made by a third party? Would Budenz be impeached if it were shown that a third party—not presented—had written that he (Budenz) had said so-and-so? We think he would not. Such reports would not be admissible unless the author was put on the stand and subjected to cross-examination. This is a classic situation requiring application of the hearsay rule. The reports, if there are any, are statements made by an unidentified third person purporting to show what a witness had said or done. The hearsay rule applies to writings. Still further, even in a criminal case under the new statute [14] the reports here involved are not required to be produced. The new act of Congress requires the production of "statements" but defines statements as those written, signed or approved by the witness himself, or "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital * * * recorded contemporaneously". Surely the executive files of the Government are not to be invaded more easily and with less basis in a regulatory administrative proceeding of this sort than they would be in a criminal prosecution.

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[14] Pub. L. No. 85-269, 71 Stat. 595 (Sept. 2, 1957).

We conclude on this point that the action of the Board in refusing to order production of the alleged reports involved in the Budenz testimony must be affirmed.

Markward.

Mrs. Mary Stalcup Markward was an active agent for the F.B.I. from May, 1943, until October, 1949. She testified before the Board that she had inquired of the F.B.I. how she as a patriotic American citizen could help the Government in this connection and that an agent told her the way would be to join the Communist Party and furnish information. She joined the Northeast Club of the Party of Washington, D. C., and thereafter held various offices in that organization, including those of press director, treasurer, membership secretary, and chairman.

Markward was a witness for the Government upon the original hearing before the Subversive Activities Control Board. She testified in regard to a so-called Frankfeld statement and in regard to money received by her from the Government. She was vigorously attacked on cross examination. During that hearing the Party moved for production of a report by Markward to the F.B.I. concerning the Frankfield statement and at the end of the case moved for production of all F.B.I. records relating to payments made to Markward. Both motions were denied.

In its remand the Supreme Court ordered the elimination from the case of the testimony of three witnesses, Crouch, Johnson and Matusow; it did not mention Markward. While the case was pending before the Board on the remand, the Party moved this court to direct a reopening in order that it might present further testimony showing that Markward was a perjurer. We denied the motion but in our order gave permission to the Board to reopen to receive testimony concerning Markward's statements about an Annie Lee Moss. The Board reopened for that purpose. Markward returned to the witness

stand and was exhaustively cross-examined. The Party moved for production of the transcript of a security hearing in respect to Annie Lee Moss, in which Markward had testified concerning Moss, and of reports by Markward to the F.B.I. concerning Moss.

The Party now presents three issues in respect to the production of F.B.I. reports in connection with the testimony by Markward. The first issue relates to the Frankfeld statement, the second to Annie Lee Moss, and the third to payments to Markward by the F.B.I. The Party also presents an issue concerning the production of the transcript of a Security Board hearing on Annie Lee Moss.

(a) The facts concerning the Frankfeld statement were: Markward testified before the Board that at a meeting of the District Committee of the Communist Party in March, 1949, at Baltimore, Maryland, a statement made by Phil Frankfeld, District chairman, was discussed. She said: 'Phil Frankfeld had made a statement to the Baltimore Sun along the same line, stating that the members of the Communist Party would not bear arms in any conflict between the United States and the Soviet Union." On cross examination the witness was asked the following questions and made the following answers:

> "Q. You stated here on page 5890 that Phil Frankfeld had made a statement to the Press, to the Baltimore Sun, specifically, along the same line, that the members of the Communist Party would not bear arms in any conflict between the United States and the Soviet Union. Now you say he did not make that statement or that he did make the statement to the Baltimore Sun; which is it? A. He made the statement in the meeting in which we were discussing the statement he had made to the Batlimore Sun, and my recollection very evidently has confused the actual statement he made to the Sun and the discussion of the statement he made to the Sun.

> "Q. So your recollection was confused on the subject, was it not? A. It was confused on the actual wording of what he said to the Sun."

Being asked whether she had made a report in writing to the F.B.I. with respect to what Frankfeld had said regarding possible conflict between the Soviet Union and the United States, the witness replied, "I made a report at that time of exactly what transpired at that meeting."

The Party moved for production of the F.B.I. report, on the ground that "there is a clear conflict between her testimony on direct examination and what she alleges the content of that report is, as well as the exhibits themselves." The motion was denied.

When the Board reopened the hearing after the remand, and pursuant to our order granting that permission, it ordered the Attorney General to produce for inspection *in camera* by the Board Markward's report to the F.B.I. concerning the Baltimore meeting in March, 1949. The report was produced, inspected *in camera*, and then sealed. Production to the Party was refused. The Board said:

> "Our review of the document revealed that, though the phraseology of the witness' testimony at the hearing was not there contained, it reported statements by Frankfeld which when read in the light of the relevant exhibits, *e.g.*, Pet. Exs. 331 (Foster, Dennis statement), 332 (Frankfeld statement), 333 (Thorez statement), and 334 (Togliatti statement) [statements by Communist Party leaders on the subject of force and violence] led us to conclude that production is not warranted. The report also contains other statements substantiating testimony she gave at the hearing on what transpired at the Party meeting, in addition to still other matters not here relevant. In short, from our knowledge of the record we concluded that no substantial credibility question was presented."

This is not a criminal proceeding, nor is it a civil action as that term describes judicial proceedings. It is an administrative action, conducted under the provisions of the Subversive Activities Control Act.[15] The pertinent section is Section 13 of the Act.[16] The Act requires a verified petition, public hearings, oral testimony, receipt of evidence, subpoenas upon request of the respondent, the right to counsel, cross examination, and a transcript of the testimony taken stenographically. It requires a report in writing by the Board, stating its findings of fact and its order, the latter to be published in the *Federal Register* when it has become final.

The statute clearly describes an adjudication as that term is used in the Administrative Procedure Act.[17] "To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play." Their proceedings must "satisfy the pertinent demands of due process".[18]

If this were a civil action in a court, or if it were a criminal case, the Party would be entitled to the production of these reports.[19] The question here is whether production is one of the fundamentals of fair play required in an administrative proceeding. We think it is.

The question is a very narrow one. The Government has not claimed privilege. It was established that Markward did make a report to the F.B.I. at or about the time of the event and that this report related to the subject of her testimony. Her credibility was vigorously attacked

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[15] Title I of the Internal Security Act of 1950, 64 Stat. 987, 50 U. S. C. A. § 781 *et seq.*

[16] 64 Stat. 998, 50 U. S. C. A. § 792.

[17] 60 Stat. 237 (1946), as amended, 5 U. S. C. A. § 1001 *et seq.*

[18] *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 143-144, 84 L. Ed. 656, 60 S. Ct. 437 (1940).

[19] Fed. R. Civ. P. 34; *Jencks* v. *United States*, 353 U. S. 657, 1 L. Ed. 2d 1103, 77 S. Ct. 1007 (1957); Pub. L. No. 85-269, 71 Stat. 595 (Sept. 2, 1957).

at precisely the point of this testimony—what Frankfeld said at the Baltimore meeting.[20] The testimony was important; it bore upon the problem, pertinent under Section 13(e)(8) of the Act, whether American Communists would bear arms in a war between the United States and the Soviet Union.

We hold that, where the Government places on the stand a witness who testifies about an event long past, and it is shown that this witness at or about the time of the event made a written report to the Government concerning that event, and the testimony is material, and the credibility of the witness in her testimony upon this precise point is attacked, the Government upon demand must produce the report made by the witness. We think simple justice, the fundamentals of fair play, require no less. The opinion of the Supreme Court in the *Jencks* case,[21] as we read it, is based upon the elementary proposition that the interest of the United States is that justice be done. The same elementary proposition applies here and leads to the same result. We must therefore remand with directions to the Board to direct the production of Markward's report to the F.B.I. concerning the Frankfeld matter.

(b) The facts relating to the Annie Lee Moss issue were: Mrs. Markward had testified in a Security Board hearing involving Moss in the Department of Defense and in the "Foreign Born" case before the Subversive Activities Control Board. In both cases she had said that an Annie Lee Moss was a member of the Northeast Club of the Communist Party in Washington, D. C., during the time the witness herself was a member.

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[20] Although the request for production of Markward's F. B. I. report on the Frankfeld statement was made at the original hearing, the Party preserved this point on appeal by its motion of August 17, 1956, to adduce additional evidence.

[21] *Supra* note 19.

In a written motion filed with the Board upon the remand the Party demanded production of the Moss security hearing transcript. The Attorney General filed the transcript under seal for *in camera* inspection by the Board. In its order reopening the hearing the Board denied the motion to produce, saying:

> "We have reviewed the documents in the *Moss* proceeding submitted by petitioner for inclusion in the record and *in camera* inspection by the Board. The review evidences, in the light of its motion, that respondent seeks to retry the *Moss* Security Hearing and probe the actions and mental processes of the Security Board and the Defense Department, and this is not a function of the Board. But even if this were permissible, our review reveals that respondent's showing that witness Markward testified falsely in the *Moss* proceeding and was disbelieved in that proceeding is not supported. The Board will, therefore, not permit testimony to be adduced going to the question of whether witness Markward was disbelieved in the *Moss* Security Hearing."

When the case was reopened and Markward returned to the witness stand, she was questioned on cross-examination concerning her identification of Moss as a member of the Party. She said: "I have never recognized her as a person whom I knew as a member of the Communist Party. My testimony has been as to what the records had to say about a person by the name of Annie Lee Moss." The aim of the cross-examination obviously was to establish that the witness had identified Moss personally and to lay a foundation for showing that this was perjury. Mrs. Markward answered affirmatively when asked whether she stated in reports to the F.B.I. that Annie Lee Moss was a member of the Communist Party. Thereupon the Party asked for the production of the F.B.I. report, or reports, on the matter. The Board refused production.

During this reopened hearing the Party renewed its demand for production of the Moss security hearing transcript. The motion was denied. In announcing that ruling the Chairman said that Mrs. Markward's identification of Mrs. Moss in the security hearing was confined to "her recollection of that name and an address in party records for certain years, none later than 1946, and that identification was not based on personal identification." The Chairman further said that "Since adequate foundation for production of the Moss transcript does not now exist in our view, it has not been ordered."

Thus the demands for the production of documents in the course of Markward's cross-examination respecting the Moss matter were (1) Markward's reports to the F.B.I. concerning Moss and (2) the transcript of the Defense Department security hearing on Moss. The Board denied the first and, after inspecting the second *in camera*, denied its production to the Party.

Pursuant to the principles heretofore recited in this opinion relative to the Frankfeld matter, we are of opinion that we must direct the Board to order the production of the above-mentioned documents, *i.e.*, the witness Markward's report to the F.B.I. and her testimony in the security hearing concerning Annie Lee Moss. The latter (the testimony) may be excised so that only relevant parts need be produced.

(c) The facts respecting the payments of money to Markward by the F.B.I. were: Mrs. Markward testified at the original hearing:

> "Q. While you were supplying the Federal Bureau of Investigation with information, Mrs. Markward, were you paid any salary by them? What sort of financial arrangements did you have with them? A. I was not paid a salary by the Federal Bureau of Investigation. Nothing I did for my government

was contingent upon receipt of any money from the Federal Bureau of Investigation or from any other government agency.

* * *

"Q. Did you receive any money from them at all? A. I did receive contributions to the expense of the work I was doing from time to time.

"Q. What sort of things would they be? Make exactly clear just what sort of arrangements you had. A. In this type of activity I was doing, it was very necessary to pay dues, to make contributions, to buy literature, that type of thing, and other incidental things.

"Q. Transportation to Washington. A. Yes, that was part of it."

After the close of the evidence in the original hearing the Party moved that the Board reopen the hearing in order to permit it (the Party) to prove that Markward testified falsely "in answering questions as to whether they [several witnesses] had been paid for their services as informers and as to the amount of such payments"; and "[i]n order to permit Respondent [Party] to obtain, by subpoena or by order of the Panel, the records of the Petitioner with regard to the amounts paid by or at the direction of Petitioner to each of Petitioner's witnesses." The Board denied the motion.

In a criminal case in the United States District Court for the Southern District of New York, *United States* v. *Flynn, et al.*, a *subpoena duces tecum* had been served upon the Attorney General requiring production of all vouchers, receipts, cancelled checks, and other records showing all payments ever made by the Department of Justice or any of its constituent divisions and bureaus to Mary Stalcup Markward (and others). In lieu of production of such records the prosecution supplied the defendants with figures setting forth "all payments of which

it has knowledge made by United States Marshals to the aforesaid persons." It was stipulated in the *Flynn* case that Mrs. Markward had received a total of $24,026.45 during the years 1943 through 1952. This stipulation became part of the record in that case and thus was public. This occurred after the original hearing before the Board in the present proceeding.

After remand to the Board the Party renewed its request for an opportunity to prove that Markward had testified falsely concerning the receipt of money from the Government. The motion was again denied.

We do not rely upon *Jencks* v. *United States*, *supra*, or upon Public Law No. 85-269 for our conclusion that the records of Markward's compensation from the F.B.I. must be produced, since these records are not "statements" of the witness but are rather records of an executive department maintained in the course of carrying out its functions. Our conclusion is based on the general proposition, exemplified by Rule 34 of the Federal Rules of Civil Procedure, that, where one party to an action is shown to have documentary evidence contradictory to the testimony of one of its witnesses, production of such documents is required upon request of an opposing party.

(d) The Blumberg matter. The essence of the Blumberg situation is: Markward testified at the trial of one Blumberg, a public proceeding in a United States District Court. Her pertinent reports to the F.B.I. were produced, and she was cross-examined at length upon that foundation. In the present proceeding the Board admitted in evidence proffered portions of the transcript of the Blumberg trial, consisting in large part of the cross-examination of Markward. It refused to permit recross-examination of Markward upon her testimony at the Blumberg trial. It also refused to admit in evidence the F.B.I. reports in that case. It did consider, in evaluating Markward's testimony, the testimonial inconsistencies which could be

noted in the Blumberg transcript. We think the action of the Board was not unreasonable. We will not reverse on the point.

V

The Party says the order of the Board must be set aside because it relied on the tainted testimony of the witness Markward.

Since, as we have already said, we are remanding for the receipt of further evidence concerning this witness, if such evidence be offered after production of the documents involved, we do not now consider this point.

VI

The Party says the order must be set aside because the Board applied biased standards of credibility, based findings on misrepresentations of the evidence, and relied on tainted testimony. The first two of these allegations do not require discussion, as we find no support for them in the record. The third requires discussion.

The Party says the testimony of the witnesses Honig, Budenz and Gitlow was "tainted" and therefore should have been stricken. It argued this point to us upon the first appeal and also to the Supreme Court. It argues the point at length in its brief now before us. The Board, in its Memorandum Opinion on the motion to strike, says that, while it recognizes that the Supreme Court remanded specifically for the elimination of the testimony of Crouch, Johnson and Matusow and that therefore technically no other allegations of "taint" were before it on the remand, it conceives the spirit of the Supreme Court's opinion to permit its reevaluation of the testimony of the witnesses Honig, Budenz and Gitlow. It made that reevaluation and concluded there was no warrant to strike their testimony.

The Supreme Court did not mean in its opinion in this case that whenever testimony is challenged as perjurious it must be expunged or disregarded. Challenges to veracity and charges of falsity are commonplaces in the courtroom. The customary charge to a jury is that, if a juror believes a witness has consciously lied about a material matter, he is at liberty to disbelieve—may disbelieve, not must—the whole of that witness's testimony.[22] The charge of perjury on the part of Crouch, Johnson and Matusow was not challenged or denied by the Government. The Court specifically gave the Board the option of holding "a hearing to ascertain the truth of petitioner's allegations, and if the testimony of the three witnesses is discredited, it must not leave that testimony part of the record."[23] As to the witnesses Honig, Budenz and Gitlow the charges of perjury are vigorously disputed by the Government and have been twice examined by the Board. We find no clear error in its conclusions upon the matter. The credibility of witnesses must be left in large part of the hearer of the testimony, a proposition too elementary to require citation of authority. We affirm the Board on this point.

VII

The Party urges that the case must be remanded because the Board in its Modified Report modified its original findings for reasons not arising from expunging the testimony of Crouch, Johnson and Matusow or the additional evidence by Markward. Its argument is that the Board could have done one or the other of two things: (1) It could have simply expunged the tainted testimony and reappraised the evidence in the light of that elimination. This would have been a reexamination under Section

[22] See 3 Wigmore, Evidence § 1010 (3d ed. 1940).

[23] *Supra* note 3, 351 U. S. at 125.

14(a) of the Act, which is what the Supreme Court and this court told the Board to do. But, says the Party, in such a proceeding the ultimate point at issue is the validity of the original order, which means its validity as of the time of its adoption, and subsequent events are not to be considered in support of it. (2) The Board could have embarked upon the consideration of a new order, taking into account all relevant data and events occurring up to the close of those proceedings. In that event, says the Party, the original order would be deemed to be abandoned and should be rescinded on the record. This would not have been a mere Section 14(a) proceeding but would have been a new proceeding with new issues. The Party says the Board actually took neither of these two alternative courses but, instead, reconsidered its original order, bringing to its support subsequent events, and made new findings not in its original findings.

We think the basic position of the Party as to the two alternatives is correct, but we do not find that the Board followed the composite course the Party asserts was followed.

The nub of the Party's contention, from a practical point of view, is that the Party upon the remand sought the admission into evidence of certain events which it says took place after the Board's original order and which tend to show the independence of the Party from domination, etc., by those in control of the world Communist movement. The Board rejected the proffer as improper under the remand under Section 14(a) of the Act.

It seems obvious to us that in a Section 14(a) remand proceeding directed by the Supreme Court the Board could expunge the testimony of Crouch, Johnson and Matusow and then make revised findings if it found the expunction required revised findings. Such is the purpose of the remand. It seems equally obvious that the Board, in reexamining its findings after the expunction, could

cite additional or other bits of evidence in the record to support its findings. Neither commissions nor courts always cite every bit of evidence in a record supporting the findings, however desirable and commendable that practice may be. Nothing prevents later citation of any or all evidence in the record supporting a given conclusion or finding. We think the Board did no more than what we have described as these proper courses.

The Party refers us to twelve instances as the more important examples of invalid revisions by the Board of its original report. We have examined each of the twelve carefully. We find that the record does not support the Party's allegations. The record shows that the revisions (1) followed from the expunction of the Crouch-Matusow-Johnson testimony relied upon in part in the original report, (2) cited in support of a finding some evidence in the original record but not specifically cited in that report, or (3) were mere rearrangements or rephrasings. Thus, for example, the *History of the Communist Party of the Soviet Union* was in the original record as Petitioner's Exhibit 330, the *Programme of the Communist International* was Petitioner's Exhibit 125, and the report by Gilbert Green was mentioned in the original report at page 63 of the Joint Appendix. The findings on "Reporting" (point 3), "Secret Practices" (point 4), "Discipline and Democratic Centralism" (point 6), "World Communist Movement" (point 7), and "Force and violence" (point 10) were originally based in part upon the testimony of Crouch, Johnson and Matusow. The Party says that, whereas the Board in its first report keyed its findings to the specific criteria in Section 13(e) of the Act, in its Modified Report it keyed some of them directly to the definition in Section 3(3). But, as we have said, the criteria of Section 13(e) are directed to a determination within the bounds of Section 3(3). We find no merit in the point. We find no merit in the point (number 2) concerning the changes in the Board's findings as to

"Directives and Policies". The Board certainly retained the substance of its original findings. And the same should be said of point 5, "Marxism-Leninism". As to point 8, "Party name", the Board commented on its significance in the original report. In point 9, "Foreign representatives", the Party complains that the Board dropped a finding as to J. Peters. That original finding was based in part at least upon the testimony of Crouch and Matusow. The Party complains that in the Modified Report the Board said it scrutinized with care the testimony of Honig, Scarletto and Cummings. It did this, as we have said, in accordance with the spirit of the remand. We find no error.

The evidence cited by the Board in connection with "Anti-Imperialism" (point 12) was all in the original record, with one exception. It develops that Exhibit 484, referred to by the Party in this point of its brief, was never admitted in evidence; in fact it was denied admission. It is cited and quoted in two places in the Modified Report—pages 94 and 120. Upon the remand the Board will strike references to that exhibit and eliminate it as support for any findings. This may necessitate reappraisal of the remaining support for some findings. If so, that reappraisal shall be made and the findings revised accordingly. We affirm the Board on point 12 in all other respects questioned by the Party.

With the exception just noted we affirm the Board upon the point discussed under part VII of this opinion.

CONCLUSION

In summary we remand to the Board for the production of the reports by the witness Markward to the F.B.I. as indicated in the course of this opinion. The remand for this purpose is a remand under Section 14(a) of the statute. On all other points (with the exception noted under part VII) we affirm the Board.

We are authorized to say that Judge Bazelon adheres to the view set forth in his dissenting opinion filed earlier in this case, that the Act violates the Fifth Amendment and hence it is unnecessary for him to reach other issues presented in that connection. He agrees with (1) the remand for the purposes we have outlined in part IV of this opinion, and (2) the denial of the Party's request for discovery with respect to the witness Scarletto. He disagrees with the denial as to (1) reports alleged to have been made to the F.B.I. by the witnesses Gitlow and Budenz, and (2) matters in the *Blumberg* case affecting the witness Markward. On the question discussed in part VII—whether the Board's revised report is improper under the mandate of the Supreme Court and this court—it is his position that, since the Board's action in response to the instant mandate may again change the Report, decision should be withheld at this time.

Remanded.

Memorandum of April 11, 1958

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850

April Term, 1958

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD,
Respondent.

MEMORANDUM TO ACCOMPANY ORDERS ON PETITIONER'S MOTIONS TO ADDUCE ADDITIONAL EVIDENCE AND THE PETITION FOR REHEARING.

Before:

PRETTYMAN, BAZELON and DANAHER,

Circuit Judges, in Chambers.

We have before us two motions of petitioner, the Communist Party of the United States of America. One is for leave to adduce additional evidence and the other is supplemental to the first one.

As far as the motions relate to statements alleged to have been made by the witness Gitlow, we adhere to the views expressed in our opinion promulgated January 9, 1958, and to the ruling there made. We think the denial of the claim for the production of that material was proper.

As far as the motions relate to statements given to the Federal Bureau of Investigation by the witness Budenz, the

motions are granted. We adopt for present purposes the definition of "statements" contained in Public Law No. 85-269, 71 Statute 385 (September 2, 1957), not because the statute is binding in this proceeding but because it embodies succinctly the rule of law we think is applicable. The Board will therefore direct the Attorney General to produce all statements made by the witness Budenz to the Federal Bureau of Investigation concerning subjects as to which Budenz testified; specifically the Starobin letter and the conversation with Weiner. As to mere memoranda, including those recorded without his knowledge, made by third persons, including Federal Bureau of Investigation agents, not produced as witnesses, concerning conversations with Budenz, we adhere to the views expressed in the opinion of January 9, 1958.

The Party contends that our opinion of January 9, 1958, is not clear in that in it we said, "On all other points (with the exception noted under Part VII) we affirm the Board", thereby implying, says the Party, that we affirmed the Board's findings of fact. The contention is obviously without merit. We remanded the case for the production of material demanded for cross-examination purposes, and this production clearly might result in a re-evaluation of some testimony and a re-examination of some findings. Under those circumstances we certainly did not intend to affirm at that same time the findings of fact theretofore made. We affirmed the Board on its conclusions of law except insofar as we noted disapproval of these conclusions. No clarification seems necessary.

Petitioner's petition for rehearing and modification of the opinion of the Court will be denied.

Per curiam.

Dated: April 11, 1958.

Judge Bazelon adheres to his views heretofore expressed in this case.

Opinion of July 30, 1959

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD,
Respondent.

On Petition for Review of Order of the Subversive Activities Control Board and on Further Hearing Following Further Proceedings before the Subversive Activities Control Board pursuant to Remand by this Court on January 9, 1958

Decided July 30, 1959

Before PRETTYMAN, Chief Judge, and BAZELON and DANAHER, Circuit Judges.

PRETTYMAN, *Chief Judge*: A Modified Report of the Subversive Activities Control Board following a second remand of this case is now before us for review. We affirmed the original report,[1] but the Supreme Court remanded for reconsideration in the light of allegations that

[1] *Communist Party of U. S.* v. *Subversive Act. Con. Bd.*, 96 U. S. App. D. C. 66, 223 F. 2d 531 (1954).

the testimony of three witnesses was perjured.[2] The Board struck the testimony of those witnesses, reexamined its findings and issued a Modified Report. We reviewed that Modified Report and remanded the case for the production of reports made by the witness Markward to the F.B.I. upon certain matters as to which she had testified, and for reexamination of certain findings as to which an exhibit of the Government had been erroneously cited and quoted. Thereafter it developed that the F.B.I. had made recordings of statements made to its agents by the witness Budenz, a fact not known to Government counsel at the time of the earlier proceedings, and in a supplemental order we directed that this matter be included in the remand and that statements made by Budenz to the F.B.I. on certain matters be produced to the Party. The Board followed the instructions upon the remand, reexamined its findings and conclusions, made changes, and issued its Modified Report upon Second Remand, now before us.

The Party iterates all points of law made by it upon the original consideration of the case by us and repeated by it upon our second consideration. Upon those points we adhere to the views heretofore expressed by us. The Party also asserts, as it has consistently asserted in both of the prior considerations, that many of the findings of the Board are not supported by a preponderance of the evidence; and it emphasizes that the present evidence in the record, reduced as it is by the striking of parts of the original evidence and by the conclusions of the Board now holding unacceptable certain other testimony, does not show a preponderance in support of the findings. We have examined the Modified Report in the light of these averments and think the findings are amply supported. The Party also makes specific points as applicable to the Report presently under review. We now examine those points.

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[2] 351 U. S. 115 (1956).

I

In our original opinion in this matter we struck,[3] as not supported by a preponderance of the evidence, a finding respecting the purposes of the secret practices of the Party. The Board has let the finding remain in its Modified Report on Second Remand. The Party says the court must therefore again remand to the Board, for an administrative redetermination in the light of the striking of this finding. We do not see why we should do so. We did not find it necessary to reverse the order of the Board, or to remand, when we first struck the finding. No new evidence on the point has been added since then, and so we adhere to our first conclusion, but the necessity for remand is now no greater than it was. And we think the Board is entitled to adhere to its view on the point until our view of it has been tested in the Supreme Court.

II

Government's witness Gitlow was expelled from the Party in 1929. In about 1940 he delivered to the F.B.I. all documents in his possession respecting the Party. He dictated, over a period of time, memoranda explaining the documents. On the witness stand before the Board he identified and explained the documents. The Party moved for production of the 1940 memoranda. The motion was denied. In our opinion of January 9, 1958,[4] our second opinion in the matter, being after the proceedings before the Board consequent to the remand by the Supreme Court, we held, in accordance with our reading of the opinion in *Consolidated Edison Co.* v. *National Labor Relations Board*,[5] that the point was not available to the

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[3] *Supra* note 1, 96 U. S. App. D. C. at 109-110, 223 F. 2d at 574-575.

[4] *Communist Party of U. S.* v. *Subversive Act. Con. Bd.*, 102 U. S. App. D. C. 395, 254 F. 2d 314 (1958).

[5] 305 U. S. 197 (1938).

Party, since it had not pursued its remedy when its motion to produce was denied by the Board at the original hearing. That remedy was a motion to adduce additional evidence under Section 14(a) of the Act.[6] After our decision the Party made such a motion in this court. We denied it. The Party now argues the case must be remanded for receipt of the Gitlow memoranda, since, it says, it has remedied the procedural defect we found in its original position. But we think a litigant cannot cure procedural defects *nunc pro tunc* after an appellate court has passed upon his contentions in the matter. Litigants frequently must make tactical decisions in the course of a trial. Also they frequently make mistakes. But, after the resultant judgment has been reviewed upon appeal, they cannot unilaterally cure their mistakes by offering to take some missing step. So to do would be to prolong indefinitely almost all litigation. Analogies are unreliable support for reasoning, but we suggest an illustration. If a litigant in an ordinary lawsuit fails to make a motion, such as to suppress, or for a mistrial, or for a directed verdict, and the appellate court holds he was not entitled to certain relief because he had not asked for it by timely motion, he canot thereafter proffer the motion and thus correct the defect and acquire a right to retrial. Failure of a trial tribunal to grant a motion not made is not reversible error, and appellate courts rarely remand for the correction of such omissions by parties litigant. No circumstance requiring such an extraordinary step by us is present here.

III

With its brief upon this appeal the Party filed a motion to adduce as additional evidence all statements filed by all witnesses who testified for the Attorney General before the Board. This is the third time this case has been

[6] 64 Stat. 1001 (1950), as amended, 50 U. S. C. A. § 793(a).

here. The motion comes too late, and in any event it is not supported by any authority respecting the production of such documents. In the *Jencks* case[7] the Supreme Court quoted with approval from its opinion in *Gordon* v. *United States*,[8] disapproving fishing expeditions.

IV

Upon the remand after our opinion of January 9, 1958, the Board struck the testimony of the witness Budenz in respect to the Starobin letter and the Weiner conversation. The Party says it should have struck all of Budenz's testimony, upon either or both of two grounds, (1) all his testimony was tainted with perjury and (2) Budenz being ill after his statements to the F.B.I. on the two matters mentioned had been produced, the Party was denied the right to cross-examine him in the light of those statements. We agree with the Board on the point. Without elaborating, it is enough to say we have examined Budenz's statements again and think his testimony is not shown to have been false or tainted with perjury. It seems to us that the various accounts given by him upon different occasions, under different questioning, of the Starobin and Weiner incidents bear a solid similarity in essentials and differ no more than truthful accounts under such conditions may well differ—indeed, if truthful, do often differ—in details, in expressions of speech, and in passing emphasis.

The disadvantage suffered by the Party, by reason of Budenz's illness and unavailability for cross-examination after the Starobin and Weiner documents (reports to the F.B.I) had been produced, was cured by the Board's striking Budenz's testimony on those two matters. We see no necessity for striking more of his testimony on account of this shortening of his cross-examination. The Party says

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[7] *Jencks* v. *United States*, 353 U. S. 657 (1957).
[8] 344 U. S. 414 (1953).

if it had been able to cross-examine in the light of the reports it might have been able to develop such a taint of perjury as to destroy all his testimony. We think not. Budenz had already been cross-examined extensively on these subjects. The possible conflicts between his testimony and his F.B.I. reports can readily be discerned, the reports having been produced. Those discrepancies are not such as to indicate perjury, much less the habit of perjury essential to be shown to taint all the witness's testimony. By securing a striking of the testimony on the two matters directly involved, the Party achieved all it could hope to achieve from these reports.

V

The Party says the Board should be required to strike all the testimony of the witness Markward, because her sworn statements concerning the Frankfeld incident and her testimony about her payments from the F.B.I. were false. The Board struck her testimony as to those two matters but declined to strike the rest of her evidence. We think the statements about the Frankfeld matter were not demonstrated to be false. She testified to her understanding of certain statements by one Thorez, by the Americans, Dennis and Foster, and by Frankfeld. In none of these statements were the words "not bear arms against the Soviet Union" used, but she gave that meaning to such expressions as "American Communists would oppose such 'an unjust, agressive, imperialist war' and would work 'with all democratic forces' to bring that war to an end." To us the meaning she gave was a permissible inference from the face of the words.

The Party says Markward's testimony about the payments made to her by the F.B.I. was so false as to taint her entire testimony and to require that all of it be stricken. It was established from the beginning of this case that Markward was a paid informant for the Government. She characterized the payments she received as expense money,

including within that term amounts expended by her for certain ordinary living expenses while she was working for the Government. She was vague in her recollection of exact amounts and dates, but she was specific in saying she received no salary and had no formal financial arrangements. The F.B.I. records of its payments to her were produced to the Party. Upon the basis of those accounts the Board held that Markward's testimony on the matter was "not acceptable", and it took this fact into account in evaluating her entire testimony. The Board concluded that Markward's testimony on all matters "should be assayed with caution." The Board also pointed out that "findings based upon her testimony are minimal; and the effect of her entire testimony upon the Board's Modified Report is inconsequential." We will not disturb these conclusions of the Board. The credibility of witnesses must be left largely to the trier of the facts; this is the rule as to both trial courts and administrative agencies. And in this connection it should be remarked that the definition of "expenses" is a vague and uncertain prescription. An expense under some circumstances is not an expense under others. A businessman's dinner at home or in his home town is not an expense; when he is on a business trip, it is one; and so on *ad infinitum*, as the casebooks readily show.

Moreover, in respect to the striking of both the Budenz testimony and the Markward testimony, we know of no rule that the trier of facts is required to disregard all the testimony of a witness whom he finds to have testified falsely in one respect. He may do so, but he is not required to do so. Instructions to juries on the point are commonplace in the courtroom. Such instructions are always that the jury *may*—never that it *must*—disregard the testimony of a witness whom it believes to have testified falsely on a material matter as to which he could not be mistaken. A rule of law compelling the trier of facts to disregard all the evidence of such a witness would not only be a revolutionary doctrine in our jurisprudence but a wholly undesirable doctrine.

VI

By concentrating on segments of the evidence and expanding their importance by discussion, to the exclusion of all the rest of the evidence, the Party seeks to have us believe there are no other significant features in the record. But the facts beyond dispute are that there is a Communist Party in Europe, based upon Marxism-Leninism, and in power in Soviet Russia; that our present petitioner was for years a member of the Communist International, and its separation from that organization was not accompanied by a repudiation, either of objectives or of methods; that it is by its own choice named the Communist Party of the United States of America, a self-imposed description not to be ignored without reason; that it once forsook the line laid down by the Communist Party abroad but, upon being severely brought to task by a leading European Communist in an open letter to Communists, reorganized itself, even to the extent of expelling its erring leader, and went back to the line; and that, save for that period of waywardness, it has never differed from the program and policy of the Communist Party abroad and has always adhered to that program and policy even in sharp changes. These major characteristics in the facts cannot be overlooked.

Guilt by association is a concept we will not even entertain for consideration, but this proceeding is not to determine guilt. It is to ascertain characteristics, and association is surely one of the best-known sources of information about characteristics. Many proverbs attest to its common acceptance—not as proof of the commission of any certain act but as evidence of character and probable characteristics. Of course such *prima facie* indications can be readily and conclusively contradicted by facts. But an uncontradicted series of facts such as we have outlined as being in this record is admissible and acceptable evidence of characteristics, policy and program. One who attaches himself by intellectual affiliation to a cause, assumes

the name of the cause, puts on the habiliments of the cause, and adheres to the course of the cause is not mistreated if it be inferred *prima facie* he is part of the cause. In the case at bar there is additional specific evidence. The preponderance of all the evidence supports the conclusion of the Board. Its order will be

Affirmed.

BAZELON, *Circuit Judge*, concurring in part and dissenting in part: Notwithstanding my disagreement with the Court's two earlier opinions in this case and its orders of April 11, 1956 and June 16, 1958, I treat them as controlling in considering the points discussed by the majority in the present opinion.

As to Point I, I would reverse and remand because of the Board's violation of our original opinion of December 23, 1954, 96 U.S.App.D.C. 66, 109-10, 223 F.2d 531, 574-75 (1954). A finding which we there ordered stricken is now still relied on by the Board.

As to Points II, III and V (as to Markward), I concur only in the result reached by the majority.

As to Point IV, I would reverse and remand. By fault of the Government, the Party was precluded from obtaining use of Budenz's statement for purposes of cross-examining him while he was still available. Without such cross-examination the Party is denied its right to show the extent, if any, to which the rest of Budenz's testimony is tainted. If, upon the remand I would order, Budenz were not available, his entire testimony would have to be stricken.

In light of my disposition of Points I and IV, I do not reach consideration of Point VI—namely, whether the Board's order is supported by a preponderance of the evidence.

APPENDIX B: JUDGMENT BELOW

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850 SEPTEMBER TERM, 1958

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD,
Respondent.

On Petition for Review of Order of the Subversive Activities Control Board and on Further Hearing Following Further Proceedings before the Subversive Activities Control Board pursuant to Remand by this Court on January 9, 1958.

Before:

PRETTYMAN, *Chief Judge*, and BAZELON and DANAHER, *Circuit Judges.*

JUDGMENT

This case came on to be heard on the record from the Subversive Activities Control Board and on the Modified Report issued by the Board following the second remand of this case by this court on January 9, 1958, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the Subversive Activities Control Board on review herein is affirmed.

Per CHIEF JUDGE PRETTYMAN.

Dated: July 30, 1959.

APPENDIX C: STATUTES INVOLVED

Subversive Activities Control Act

The Internal Security Act of 1950, 64 Stat. 987, 50 U. S. C. 781 ff., as amended, provides in part as follows:

AN ACT

To protect the United States against certain un-American and subversive activities by requiring registration of Communist organizations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America and Congress assembled, That this Act may be cited as the "Internal Security Act of 1950".

TITLE I—SUBVERSIVE ACTIVITIES CONTROL

SECTION 1. (a) This title may be cited as the "Subversive Activities Control Act of 1950."

(b) Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect.

NECESSITY FOR LEGISLATION

SEC. 2. As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration

into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

(2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.

(3) The system of government known as a totalitarian dictatorship is characterized by the existence of a single political party, organized on a dictatorial basis, and by substantial identity between such party and its policies and the government and governmental policies of the country in which it exists.

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

(5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purpose of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

(6) The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objective of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves.

(7) In carrying on the activities referred to in paragraph (6), such Communist organizations in various countries are organized on a secret, conspiratorial basis and operate to a substantial extent through organizations, commonly known as "Communist fronts", which in most instances are created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership. One result of this method of operation is that such affiliated organizations are able to obtain financial and other support from persons who would not extend such support if they knew the true purposes of, and the actual nature of the control and influence exerted upon, such "Communist fronts".

(8) Due to the nature and scope of the world Communist movement, with the existence of affiliated

constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.

(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

(10) In pursuance of communism's stated objectives, the most powerful existing Communist dictatorship has, by the methods referred to above, already caused the establishment in numerous foreign countries of Communist totalitarian dictatorships, and threatens to establish similar dictatorships in still other countries.

(11) The agents of communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law.

(12) The Communist network in the United States is inspired and controlled in large part by foreign agents who are sent into the United States ostensibly as attaches of foreign legations, affiliates of international organizations, members of trading commissions, and in similar capacities, but who use their diplomatic or semi-diplomatic status as a shield behind which to engage in activities prejudicial to the public security.

(13) There are, under our present immigration laws, numerous aliens who have been found to be

deportable, many of whom are in the subversive, criminal, or immoral classes who are free to roam the country at will without supervision or control.

(14) One device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society.

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparation by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

DEFINITIONS

SEC. 3. For the purposes of this title—

(1) The term "person" means an individual or an organization.

(2) The term "organization" means an organization, corporation, company, partnership, association, trust foundation, or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together for joint action on any subject or subjects.

(3) The term "Communist-action organization" means—

(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; and

(b) any section, branch, fraction, or cell of any organization defined in subparagraph (a) of this paragraph which has not complied with the registration requirements of this title.

(4) The term "Communist-front organization" means any organization in the United States (other than a Communist-action organization as defined in paragraph (3) of this section) which (A) is substantially directed, dominated, or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 2 of this title.

(4A) The term "Communist-infiltrated organization" means any organization in the United States (other than a Communist-action organization or a Communist-front organization) which (A) is substantially directed, dominated, or controlled by an individual or individuals who are, or who within three years have been actively engaged in, giving aid or support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 2 of this title, and (B) is serving, or within three years has served, as a means for (i) the giving of aid or support to any such organization, government, or movement, or (ii) the impairment of the military strength of the United States or its industrial capacity to furnish logistical or other material support required by its Armed Forces: *Provided, however,* That any labor organization which is an affiliate in good standing of a national federation or other labor organization whose policies and activities have been directed to opposing Communist organizations, any Communist foreign government, or the world Communist movement, shall be presumed prima facie not to be a "Communist-infiltrated organization."[1]

(5) The term "Communist organization" means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization.[2]

(6) The term "to contribute funds or services" includes the rendering of any personal service and the making of any gift, subscription, loan, advance, or deposit, of money or of anything of value, and also the making of any contract, promise, or agreement to contribute funds or services, whether or not legally enforcible.

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[1] Added by sec. 7(a) of the Communist Control Act of 1954, 68 Stat. 777.

[2] As amended by sec. 7(b) of the Communist Control Act of 1954, 68 Stat. 778.

(7) The term "facility" means any plant, factory or other manufacturing, producing or service establishment, airport, airport facility, vessel, pier, water-front facility, mine, railroad, public utility, laboratory, station, or other establishment or facility, or any part, division, or department of any of the foregoing. The term "defense facility" means any facility designated and proclaimed by the Secretary of Defense pursuant to section 5(b) of this title and included on the list published and currently in effect under such subsection, and which is in compliance with the provisions of such subsection respecting the posting of notice of such designation.

(8) The term "publication" means any circular, newspaper, periodical, pamphlet, book, letter, post card, leaflet, or other publication.

(9) The term "United States", when used in a geographical sense, includes the several States, Territories, and possessions of the United States, the District of Columbia, and the Canal Zone.

(10) The term "interstate or foreign commerce" means trade, traffic, commerce, transportation, or communication (A) between any State, Territory, or possession of the United States (including the Canal Zone), or the District of Columbia, and any place outside thereof, or (B) within any territory or possession of the United States (including the Canal Zone), or within the District of Columbia.

(11) The term "Board" means the Subversive Activities Control Board created by section 12 of this title.

(12) The term "final order of the Board" means an order issued by the Board under section 13 of this title, which has become final as provided in section 14 of this title.

(13) The term "advocates" includes advises, recommends, furthers by overt act, and admits belief in; and the giving, loaning, or promising of support or of money or anything of value to be used for advocating any doctrine shall be deemed to constitute the advocating of such doctrine.

(14) The term "world communism" means a revolutionary movement, the purpose of which is to establish eventually a Communist totalitarian dictatorship in any or all the countries of the world through the medium of an internationally coordinated Communist movement.

(15) The terms "totalitarian dictatorship" and "totalitarianism" mean and refer to systems of government not representative in fact, characterized by (A) the existence of a single political party, organized on a dictatorial basis, with so close an identity between such party and its policies and the governmental policies of the country in which it exists, that the party and the government constitute an indistinguishable unit, and (B) the forcible suppression of opposition to such party.

(16) The term "doctrine" includes, but is not limited to, policies, practices, purposes, aims, or procedures.

(17) The giving, loaning, or promising of support or of money or any other thing of value for any purpose to any organization shall be conclusively presumed to constitute affiliation therewith; but nothing in this paragraph shall be construed as an exclusive definition of affiliation.

(18) "Advocating the economic, international, and governmental doctrines of world communism" means advocating the establishment of a totalitarian Communist dictatorship in any or all of the countries of the world through the medium of an internationally coordinated Communist movement.

(19) "Advocating the economic and governmental doctrines of any other form of totalitarianism" means advocating the establishment of totalitarianism (other than world communism) and includes, but is not limited to, advocating the economic and governmental doctrines of fascism and nazism.

CERTAIN PROHIBITED ACTS

SEC. 4. (a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 3 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

(b) It shall be unlawful for any officer or employee of the United States or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, to communicate in any manner or by any means, to any other person whom such officer or employee knows or has reason to believe to be an agent or representative of any foreign government or an officer or member of any Communist organization as defined in paragraph (5) of section 3 of this title, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, knowing or having reason to know that such information has been so classified, unless such officer or employee shall have been specifically authorized by the President, or by the head of the department,

agency, or corporation by which this officer or employee is employed, to make such disclosure of such information.

(c) It shall be unlawful for any agent or representative of any foreign government, or any officer or member of any Communist organization as defined in paragraph (5) of section 3 of this title, knowingly to obtain or receive, or attempt to obtain or receive, directly or indirectly, from any officer or employee of the United States or of any department or agency thereof or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, unless special authorization for such communication shall first have been obtained from the head of the department, agency, or corporation having custody of or control over such information.

(d) Any person who violates any provision of this section shall, upon conviction thereof, be punished by a fine of not more than $10,000, or imprisonment for not more than ten years, or by both such fine and such imprisonment, and shall, moreover, be thereafter ineligible to hold any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

(e) Any person may be prosecuted, tried, and punished for any violation of this section at any time within ten years after the commission of such offense, notwithstanding the provisions of any other statute of limitations: *Provided*, That if at the time of the commission of the offense such person is an officer or employee of the United States or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency

thereof, such person may be prosecuted, tried, and punished for any violation of this section at any time within ten years after such person has ceased to be employed as such officer or employee.

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 7 or section 8 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

EMPLOYMENT OF MEMBERS OF COMMUNIST ORGANIZATIONS

SEC. 5. (a) When a Communist organization, as defined in paragraph (5) of section 3 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(A) in seeking, accepting, or holding any nonelective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or

(B) to hold any nonelective office or employment under the United States; or

(C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility; or

(E) to hold office or employment with any labor organization, as that term is defined in section 2(5) of the National Labor Relations Act, as amended (29 U. S. C. 152), or to represent any employer in any matter or proceeding arising or pending under that Act.[3]

(2) For any officer or employee of the United States or of any defense facility, with knowledge or notice that such organization is so registered or that such order has become final—

(A) to contribute funds or services to such organization; or

(B) to advise, counsel or urge any person, with knowledge or notice that such person is a member of such organization, to perform, or to omit to perform, any act if such act or omission would constitute a violation of any provision of subparagraph (1) of this subsection.

(b) The Secretary of Defense is authorized and directed to designate and proclaim, and from time to time revise, a list of facilities, as defined in paragraph (7) of section 3 of this title, with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions of subsection (a) of this section. The Secretary shall cause such list as designated and proclaimed, or any revision thereof, to be promptly published in the Federal Register, and shall promptly notify the management of any facility so listed; whereupon such management shall immediately post con-

[3] Added by sec. 6 of the Communist Control Act of 1954, 68 Stat. 777.

spicuously, and thereafter while so listed keep posted, notice of such designation in such form and in such place or places as to give reasonable notice thereof to all employees of, and to all applicants for employment in, such facility.

Denial of Passports to Members of Communist Organizations

Sec. 6. (a) When a Communist organization as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization.

Registration and Annual Reports of Communist Organizations

Sec. 7. (a) Each Communist-action organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this sec-

tion, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-action organization.

(b) Each Communist-front organization (including any organization required, by a final order of the Board, to register as a Communist-front organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-front organization.

(c) The registration required by subsection (a) or (b) shall be made—

(1) in the case of an organization which is a Communist-action organization or a Communist-front organization on the date of the enactment of this title, within thirty days after such date;

(2) in the case of an organization becoming a Communist-action organization or a Communist-front organization after the date of the enactment of this title, within thirty days after such organization becomes a Communist-action organization or a Communist-front organization, as the case may be; and

(3) in the case of an organization which by a final order of the Board is required to register, within thirty days after such order becomes final.

(d) The registration made under subsection (a) or (b) shall be accompanied by a registration statement, to be prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

(1) The name of the organization and the address of its principal office.

(2) The name and last-known address of each individual who is at the time of filing of such registra-

tion statement, and of each individual who was at any time during the period of twelve full calendar months next preceding the filing of such statement, an officer of the organization, with the designation or title of the office so held, and with a brief statement of the duties and functions of such individual as such officer.

(3) An accounting, in such form and detail as the Attorney General shall by regulations prescribe, of all moneys received and expended (including the sources from which received and the purposes for which expended) by the organization during the period of twelve full calendar months next preceding the filing of such statement.

(4) In the case of a Communist-action organization, the name and last-known address of each individual who was a member of the organization at any time during the period of twelve full calendar months preceding the filing of such statement.

(5) In the case of any officer or member whose name is required to be shown in such statement, and who uses or has used or who is or has been known by more than one name, each name which such officer or member uses or has used or by which he is known or has been known.

(6) A listing, in such form and detail as the Attorney General shall by regulation prescribe, of all printing presses and machines including but not limited to rotary presses, flatbed cylinder presses, platen presses, lithographs, offsets, photo-offsets, mimeograph machines, multigraph machines, multilith machines, duplicating machines, ditto machines, linotype machines, intertype machines, monotype machines, and all other types of printing processes, typesetting machines or any mechanical devices used

or intended to be used, or capable of being used to produce or publish printed matter or material, which are in the possession, custody, ownership, or control of the Communist-action or Communist-front organization or its officers, members, affiliates, associates, group, or groups in which the Communist-action or Communist-front organization, its officers or members have an interest.[4]

(e) It shall be the duty of each organization registered under this section to file with the Attorney General on or before February 1 of the year following the year in which it registers, and on or before February 1 of each succeeding year, an annual report, prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the same information which by subsection (d) is required to be included in a registration statement, except that the information required with respect to the twelve-month period referred to in paragraph (2), (3), or (4) of such subsection shall, in such annual report, be given with respect to the calendar year preceding the February 1 on or before which such annual report must be filed.

(f)(1) It shall be the duty of each organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe, accurate records and accounts of moneys received and expended (including the sources from which received and purposes for which expended) by such organization.

(2) It shall be the duty of each Communist-action organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe, accurate records of the names and addresses of the members of such organization and of persons who actively participate in the activities of such organization.

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[4] Added by P. L. 557, 83d Cong., 2d Sess., 68 Stat. 586.

(g) It shall be the duty of the Attorney General to send to each individual listed in any registration statement or annual report, filed under this section, as an officer or member of the organization in respect of which such registration statement or annual report was filed, a notification in writing that such individual is so listed; and such notification shall be sent at the earliest practicable time after the filing of such registration statement or annual report. Upon written request of any individual so notified who denies that he holds any office or membership (as the case may be) in such organization, the Attorney General shall forthwith initiate and conclude at the earliest practicable time an appropriate investigation to determine the truth or falsity of such denial, and, if the Attorney General shall be satisfied that such denial is correct, he shall thereupon strike from such registration statement or annual report the name of such individual. If the Attorney General shall decline or fail to strike the name of such individual from such registration statement or annual report within five months after receipt of such written request, such individual may file with the Board a petition for relief pursuant to section 13(b) of this title.

(h) In the case of failure on the part of any organization to register or to file any registration statement or annual report as required by this section, it shall be the duty of the executive officer (or individual performing the ordinary and usual duties of an executive officer) and of the secretary (or individual performing the ordinary and usual duties of the secretary) of such organization, and of such officer or officers of such organization as the Attorney General shall by regulations prescribe, to register for such organization, to file such registration statement, or to file such annual report, as the case may be.

REGISTRATION OF MEMBERS OF COMMUNIST-ACTION ORGANIZATIONS

SEC. 8 (a) Any individual who is or becomes a member of any organization concerning which (1) there is in effect a final order of the Board requiring such organization to register under section 7(a) of this title as a Communist-action organization, (2) more than thirty days have elapsed since such order has become final, and (3) such organization is not registered under section 7 of this title as a Communist-action organization, shall within sixty days after said order has become final, or within thirty days after becoming a member of such organization, whichever is later, register with the Attorney General as a member of such organization.

(b) Each individual who is or becomes a member of any organization which he knows to be registered as a Communist-action organization under section 7(a) of this title, but to have failed to include his name upon the list of members thereof filed with the Attorney General, pursuant to the provisions of subsections (d) and (e) of section 7 of this title, shall, within sixty days after he shall have obtained such knowledge, register with the Attorney General as a member of such organization.

(c) The registration made by any individual under subsection (a) or (b) of this section shall be accompanied by a registration statement to be prepared and filed in such manner and form, and containing such information, as the Attorney General shall by regulations prescribe.

KEEPING OF REGISTERS; PUBLIC INSPECTION; REPORTS TO PRESIDENT AND CONGRESS

SEC. 9. (a) The Attorney General shall keep and maintain separately in the Department of Justice—

(1) a "Register of Communist-Action Organizations", which shall include (A) the names and

addresses of all Communist-action organizations registered under section 7, (B) the registration statements and annual reports filed by such organizations thereunder, and (C) the registration statements filed by individuals under section 8; and

(2) a "Register of Communist-Front Organizations", which shall include (A) the names and addresses of all Communist-front organizations registered under section 7, and (B) the registration statements and annual reports filed by such organizations thereunder.

(b) Such registers shall be kept and maintained in such manner as to be open for public inspection: *Provided*, That the Attorney General shall not make public the name of any individual listed in either such register as an officer or member of any Communist organization until sixty days shall have elapsed after the transmittal of the notification required by section 7(g) to be sent to such individual, and if prior to the end of such period such individual shall make written request to the Attorney General for the removal of his name from any such list, the Attorney General shall not make public the name of such individual until six months shall have elapsed after receipt of such request by the Attorney General, or until thirty days shall have elapsed after the Attorney General shall have denied such request and shall have transmitted to such individual notice of such denial, whichever is earlier.

(c) The Attorney General shall submit to the President and to the Congress on or before June 1 of each year (and at any other time when requested by either House by resolution) a report with respect to the carrying out of the provisions of this title, including the names and addresses of the organizations listed in such registers and (except to the extent prohibited by subsection (b) of this section) the names and addresses of the individuals listed as members of such organizations.

(d) Upon the registration of each Communist organization under the provisions of this title, the Attorney General shall publish in the Federal Register the fact that such organization has registered as a Communist-action organization, or as a Communist-front organization, as the case may be, and the publication thereof shall constitute notice to all members of such organization that such organization has so registered.

USE OF THE MAILS AND INSTRUMENTALITIES OF INTERSTATE OR FOREIGN COMMERCE

SEC. 10. It shall be unlawful for any organization which is registered under section 7, or for any organization with respect to which there is in effect a final order of the Board requiring it to register under section 7, or determining that it is a Communist-infiltrated organization,[5] or for any person acting for or on behalf of any such organization—

(1) to transmit or cause to be transmitted, through the United States mails or by any means or instrumentality of interstate or foreign commerce, any publication which is intended to be, or which it is reasonable to believe is intended to be, circulated or disseminated among two or more persons, unless such publication, and any envelope, wrapper, or other container in which it is mailed or otherwise circulated or transmitted, bears the following, printed in such manner as may be provided in regulations prescribed by the Attorney General, with the name of the organization appearing in lieu of the blank: "Disseminated by ————————, a Communist organization"; or

(2) to broadcast or cause to be broadcast any matter over any radio or television station in the

[5] Reference to Communist-infiltrated organizations added by sec. 8(a) of the Communist Control Act of 1954, 68 Stat. 778.

United States, unless such matter is preceded by the following statement, with the name of the organization being stated in place of the blank: "The following program is sponsored by ————————, a Communist organization[4]".

DENIAL OF TAX DEDUCTIONS AND EXEMPTIONS

SEC. 11. (a) Notwithstanding any other provisions of law, no deduction for Federal income-tax purposes shall be allowed in the case of a contribution to or for the use of any organization if at the time of the making of such contribution (1) such organization is registered under section 7, or (2) there is in effect a final order of the Board requiring such organization to register under section 7 or determining that it is a Communist-infiltrated organization.[6]

(b) No organization shall be entitled to exemption from Federal income tax, under section 101 of the Internal Revenue Code, for any taxable year if at any time during such taxable year (1) such organization is registered under section 7, or (2) there is in effect a final order of the Board requiring such organization to register under section 7 or determining that it is a Communist-infiltrated organization.[7]

SUBVERSIVE ACTIVITIES CONTROL BOARD

SEC. 12. (a) There is hereby established a board, to be known as the Subversive Activities Control Board, which shall be composed of five members, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three members of the Board shall be members of the same political party. The terms of office of the members of the Board in office on the date of enactment of the Subversive Activities Control Board Tenure

[6] See footnote 5.
[7] See footnote 5.

Act shall expire at the time they would have expired if such Act had not been enacted. The term of office of each member of the Board, appointed after the date of enactment of the Subversive Activities Control Board Tenure Act shall be for five years from the date of expiration of the term of his predecessor, except, that (1) the term of office of that member of the Board who is designated by the President and is appointed to succeed one of the two members of the Board whose terms expire on August 9, 1955 shall be for four years from the date of expiration of the term of his predecessor, and (2) the term of office of any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be for the remainder of the term of his predecessor. Upon the expiration of his term of office a member of the Board shall continue to serve until his successor shall have been appointed and shall have qualified.[8] The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) Any vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and three members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to the Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees of the Board, and an account of all moneys it has disbursed.

(d) Each member of the Board shall receive a salary of $20,000 a year,[9] shall be eligible for reappointment, and

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[8] Provisions relating to tenure amended by the Subversive Activities Control Board Tenure Act, 69 Stat. 539.

[9] Orginally $12,500. Raised to present figure for Board members and $20,500 for the Board Chairman by secs. 105 and 106 of the Federal Executive Pay Act of 1956, P. L. 854, 84th Cong., 2d Sess.

shall not engage in any other business, vocation, or employment.

(e) It shall be the duty of the Board—

(1) upon application made by the Attorney General under section 13(a) of this title, or by any organization under section 13(b) of this title, to determine whether any organization is a "Communist-action organization" within the meaning of paragraph (3) of section 3 of this title, or a "Communist-front organization" within the meaning of paragraph (4) of section 3 of this title; and

(2) upon application made by the Attorney General under section 13(a) of this title, or by any individual under section 13(b) of this title, to determine whether any individual is a member of any Communist-action organization registered, or by final order of the Board required to be registered, under section 7(a) of this title; and

(3) upon any application made under subsection (a) or subsection (b) of section 13A of this title, to determine whether any organization is a Communist-infiltrated organization.[10]

(f) Subject to the civil-service laws and Classification Act of 1949, the Board may appoint and fix the compensation of a chief clerk and such examiners and other personnel as may be necessary for the performance of its functions.

(g) The Board may make such rules and regulations, not inconsistent with the provisions of this title, as may be necessary for the performance of its duties.

(h) There are hereby authorized to be appropriated to the Board such sums as may be necessary to carry out its functions.

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[10] Added by sec. 9(a) of the Communist Control Act of 1954, 68 Stat. 778.

REGISTRATION PROCEEDINGS BEFORE BOARD [11]

SEC. 13. (a) Whenever the Attorney General shall have reason to believe that any organization which has not registered under subsection (a) or subsection (b) of section 7 of this title is in fact an organization of a kind required to be registered under such subsection, or that any individual who has not registered under section 8 of this title is in fact required to register under such section, he shall file with the Board and serve upon such organization or individual a petition for an order requiring such organization or individual to register pursuant to such subsection or section, as the case may be. Each such petition shall be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support of his prayer for the issuance of such order.

(b) Any organization registered under subsection (a) or subsection (b) of section 7 of this title, and any individual registered under section 8 of this title, may, not oftener than once in each calendar year, make application to the Attorney General for the cancellation of such registration and (in the case of such organization) for relief from obligation to make further annual reports. Within sixty days after the denial of any such application by the Attorney General, the organization or individual concerned may file with the Board and serve upon the Attorney General a petition for an order requiring the cancellation of such registration and (in the case of such organization) relieving such organization of obligation to make further annual reports. Any individual authorized by section 7(g) of this title to file a petition for relief may file with the Board and serve upon the Attorney General a petition for an order requiring the Attorney General to strike his name from the registration statement or annual report upon which it appears.

[11] "Registration" added by sec. 9(b) of the Communist Control Act of 1954, 68 Stat. 778.

(c) Upon the filing of any petition pursuant to subsection (a) or subsection (b) of this section, the Board (or any member thereof or any examiner designated thereby) may hold hearings, administer oaths and affirmations, may examine witnesses and receive evidence at any place in the United States, and may require by subpoena the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed relevant, to the matter under inquiry. Subpoenas may be signed and issued by any member of the Board or any duly authorized examiner. Subpoenas shall be issued on behalf of the organization or the individual who is a party to the proceeding upon request and upon a statement or showing of general relevance and reasonable scope of the evidence sought. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States at any designated place of hearing. Witnesses summoned shall be paid the same fees and mileage paid witnesses in the district courts of the United States. In cases of disobedience to a subpena, the Board may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpena issued to any person, issue an order requiring such person to appear (and to produce documentary evidence if so ordered) and give evidence relating to the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. No person shall be held liable in any action in any court, State or Federal, for any damages resulting from (1) his production of any documentary

evidence in any proceeding before the Board if he is required, by a subpena issued under this subsection, to produce the evidence; or (2) any statement under oath he makes in answer to a question he is asked while testifying before the Board in response to a subpoena issued under this subsection, if the statement is pertinent to the question.

(d)(1) All hearings conducted under this section shall be public. Each party to such proceeding shall have the right to present its case with the assistance of counsel, to offer oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. An accurate stenographic record shall be taken of the testimony of each witness, and a transcript of such testimony shall be filed in the office of the Board.

(2) Where an organization or individual declines or fails to appear at a hearing accorded to such organization or individual by the Board pursuant to this section, the Board may, without further proceedings and without the introduction of any evidence, enter an order requiring such organization or individual to register or denying the application of such organization or individual, as the case may be. Where in the course of any hearing before the Board or any examiner thereof a party or counsel is guilty of misbehavior which obstructs the hearing, such party or counsel may be excluded from further participation in the hearing.

(e) In determining whether any organization is a "Communist-action organization", the Board shall take into consideration—

(1) the extent to which its policies are formulated and carried out and its activities performed, pursuant to directives or to effectuate the policies of the foreign government or foreign organization in which

is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement referred to in section 2 of this title; and

(2) the extent to which its views and policies do not deviate from those of such foreign government or foreign organization; and

(3) the extent to which it receives financial or other aid, directly or indirectly, from or at the direction of such foreign government or foreign organization; and

(4) the extent to which it sends members or representatives to any foreign country for instruction or training in the principles, policies, strafegy, or tactics of such world Communist movement; and

(5) the extent to which it reports to such foreign government or foreign organization or to its representatives; and

(6) the extent to which its principal leaders or a substantial number of its members are subject to or recognize the disciplinary power of such foreign government or foreign organization or its representatives; and

(7) the extent to which, for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives, (i) it fails to disclose, or resists efforts to obtain information as to, its membership (by keeping membership lists in code, by instructing members to refuse to acknowledge membership, or by any other method); (ii) its members refuse to acknowledge membership therein; (iii) it fails to disclose, or resists efforts to obtain information as to, records other than membership lists; (iv) its meeting are secret; and (v) it otherwise operates on a secret basis; and

(8) the extent to which its principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization.

(f) In determining whether any organization is a "Communist-front organization", the Board shall take into consideration—

(1) the extent to which persons who are active in its management, direction, or supervision, whether or not holding office therein, are active in the management, direction, or supervision of, or as representatives of, any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(2) the extent to which its support, financial or otherwise, is derived from any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(3) the extent to which its funds, resources, or personnel are used to further or promote the objectives of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(4) the extent to which the positions taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2.

(g) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order requiring such organization to register as such under section 7 of this title; or

(2) that an individual is a member of a Communist-action organization (including an organization required by final order of the Board to register under section 7(a)), it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order requiring him to register as such under section 8 of this title.

(h) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or Communist-front organization as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order denying his petition for an order requiring such organization to register as such under section 7 of this title; and send a copy of such order to such organization; or

(2) that an individual is not a member of any Communist-action organization, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order denying his petition for an order requiring such individual to register as such member under section 8 of this title; and send a copy of such order to such individual.

(i) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to cancel the registration of such organization and relieve it from the requirement of further annual report; and send a copy of such order to such organization; or

(2) that an individual is not a member of any Communist-action organization, or (in the case of an individual listed as an officer of a Communist-front organization) that an individual is not an officer of a Communist-front organization, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to (A) strike the name of such individual from the registration statement or annual report upon which it appears or (B) cancel the registration of such individual under section 8, as may be appropriate; and send a copy of such order to such individual.

(j) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order denying its petition for the cancellation of its registration and for relief from the requirement of further annual reports; or

(2) that an individual is a member of a Communist-action organization, or (in the case of an individual listed as an officer of a Communist-front organization) that an individual is an officer of a

Communist-front organization, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order denying his petition for an order requiring the Attorney General (A) to strike his name from any registration statement or annual report on which it appears or (B) to cancel the registration of such individual under section 8, as the case may be.

(k) When an order of the Board requiring registration of a Communist organization becomes final under the provisions of section 14(b) of this title, the Board shall publish in the Federal Register the fact that such order has become final, and publication thereof shall constitute notice to all members of such organization that such order has become final.

PROCEEDINGS WITH RESPECT TO COMMUNIST-INFILTRATED ORGANIZATIONS [12]

SEC. 13A. (a) Whenever the Attorney General has reason to believe that any organization is a Communist-infiltrated organization, he may file with the Board and serve upon such organization a petition for a determination that such organization is a Communist-infiltrated organization. In any proceeding so instituted, two or more affiliated organizations may be named as joint respondents. Whenever any such petition is accompanied by a certificate of the Attorney General to the effect that the proceeding so instituted is one of exceptional public importance, such proceeding shall be set for hearing at the earliest possible time and all proceedings therein before the Board or any court shall be expedited to the greatest practicable extent.

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[12] Section added by sec. 10 of the Communist Control Act of 1954, 68 Stat. 778.

(b) Any organization which has been determined under this section to be a Communist-infiltrated organization may, within six months after such determination, file with the Board and serve upon the Attorney General a petition for a determination that such organization no longer is a Communist-infiltrated organization.

(c) Each such petition shall be verified under oath, and shall contain a statement of the facts relied upon in support thereof. Upon the filing of any such petition, the Board shall serve upon each party to such proceeding a notice specifying the time and place for hearing upon such petition. No such hearing shall be conducted within twenty days after the service of such notice.

(d) The provisions of subsections (c) and (d) of section 13 shall apply to hearings conducted under this section, except that upon the failure of any organization named as a party in any petition filed by or duly served upon it pursuant to this section to appear at any hearing upon such petition, the Board may conduct such hearing in the absence of such organization and may enter such order under this section as the Board shall determine to be warranted by evidence presented at such hearing.

(e) In determining whether any organization is a Communist-infiltrated organization, the Board shall consider—

(1) to what extent, if any, the effective management of the affairs of such organization is conducted by one or more individuals who are, or within three years have been, (A) members, agents, or representatives of any Communist organization, and Communist foreign government, or the world Communist movement referred to in section 2 of this title, with knowledge of the nature and purpose thereof; or (B) engaged in giving aid or support to any such organization, government, or movement with knowledge of the nature and purpose thereof;

(2) to what extent, if any, the policies of such organization are, or within three years have been, formulated and carried out pursuant to the direction or advice of any member, agent, or representative of any such organization, government, or movement;

(3) to what extent, if any, the personnel and resources of such organization are, or within three years have been used to further or promote the objectives of any such Communist organization, government, or movement;

(4) to what extent, if any, such organization within three years has received from, or furnished to or for the use of, any such Communist organization, government, or movement any funds or other material assistance;

(5) to what extent, if any, such organization is, or within three years has been, affiliated in any way with any such Communist organization, government, or movement;

(6) to what extent, if any, the affiliation of such organization or of any individual or individuals who are members thereof or who manage its affairs, with any such Communist organization, government, or movement is concealed from or is not disclosed to the membership of such organization; and

(7) to what extent, if any, such organization or any of its members or managers are, or within three years have been, knowingly engaged—

(A) in any conduct punishable under section 4 or 15 of this Act or under chapters 37, 105, 115 of title 18 of the United States Code; or

(B) with intent to impair the military strength of the United States or its industrial capacity to furnish logistical or other support re-

quired by its armed forces, in any activity resulting in or contributing to any such impairment.

(f) After hearing upon any petition filed under this section, the Board shall (1) make a report in writing in which it shall state findings as to the facts and its conclusion with respect to the issues presented by such petition, (2) enter its order granting or denying the determination sought by such petition, and (3) serve upon each party to the proceeding a copy of such order. Any order granting any determination on the question whether any organization is a Communist-infiltrated organization shall become final as provided in section 14(b) of this Act.

(g) When any order has been entered by the Board under this section with respect to any labor organization or employer (as these terms are defined by section 2 of the National Labor Relations Act, as amended, and which are organizations within the meaning of section 3 of the Subversive Activities Control Act of 1950), the Board shall serve a true and correct copy of such order upon the National Labor Relations Board and shall publish in the Federal Register a statement of the substance of such order and its effective date.

(h) When there is in effect a final order of the Board determining that any such labor organization is a Communist-action organization, a Communist-front organization, or a Communist-infiltrated organization, such labor organization shall be ineligible to—

(1) act as representative of any employee within the meaning or for the purposes of section 7 of the National Labor Relations Act, as amended (29 U. S. C. 157);

(2) serve as an exclusive representative of employees of any bargaining unit under section 9 of such Act, as amended (29 U. S. C. 159);

(3) make, or obtain any hearing upon, any charge under section 10 of such Act (29 U. S. C. 160); or

(4) exercise any other right or privilege, or receive any other benefit, substantive or procedural, provided by such Act for labor organizations.

(i) When an order of the Board determining that any such labor organization is a Communist-infiltrated organization has become final, and such labor organization theretofore has been certified under the National Labor Relations Act, as amended, as a representative of employees in any bargaining unit—

(1) a question of representation affecting commerce, within the meaning of section 9(c) of such Act, shall be deemed to exist with respect to such bargaining unit; and

(2) the National Labor Relations Board, upon petition of not less than 20 per centum of the employees in such bargaining unit or any person or persons acting in their behalf, shall under section 9 of such Act (notwithstanding any limitation of time contained therein) direct elections in such bargaining unit or any subdivision thereof (A) for the selection of a representative thereof for collective bargaining purposes, and (B) to determine whether the employees thereof desire to rescind any authority previously granted to such labor organization to enter into any agreement with their employer pursuant to section 8(a) (3)(ii) of such Act.

(j) When there is in effect a final order of the Board determining that any such employer is a Communist-infiltrated organization, such employer shall be ineligible to—

(1) file any petition for an election under section 9 of the National Labor Relations Act, as amended

(29 U. S. C. 157), or participate in any proceeding under such section; or

(2) make or obtain any hearing upon any charge under section 10 of such Act (29 U. S. C. 160); or

(3) exercise any other right or privilege or receive any other benefit, substantive or procedural, provided by such Act for employers.

JUDICIAL REVIEW

SEC. 14. (a) The party aggrieved by any order entered by the Board under subsection (g), (h), (i), or (j) of section 13, or subsection (f) of section 13A,[18] may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of service upon it of such order, a written petition praying that the order of the Board be set aside. A copy of such petition shall forthwith be transmitted by the clerk of the court to the Board, and thereupon the Board shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon the filing of such petition the court shall have jurisdiction of the proceeding and shall have power to affirm or set aside the order of the Board; but the court may in its discretion and upon its own motion transfer any action so commenced to the United States Court of Appeals for the circuit wherein the petitioner resides. The findings of the Board as to the facts, if supported by the preponderance of the evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the

[18] Matter between commas added by section 11 of the Communist Control Act of 1954, 68 Stat. 780.

Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by the preponderance of the evidence shall be conclusive, and its recommendations, if any, with respect to action in the matter under consideration. If the court shall set aside an order issued under subsection (j) of section 13 it may, in the case of an organization, enter a judgment canceling the registration of such organization and relieving it from the requirement of further annual reports, or in the case of an individual, enter a judgment requiring the Attorney General (A) to strike the name of such individual from the registration statement or annual report on which it appears, or (B) cancel the registration of such individual under section 8, as may be appropriate. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in title 28, United States Code, section 1254.

(b) Any order of the Board issued under section 13, or subsection (f) of section 13A,[14] shall become final—

(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Board has been affirmed or the petition for review dismissed by a United States Court of Appeals, and no petition for certiorari has been duly filed; or

(3) upon the denial of a petition for certiorari, if the order of the Board has been affirmed or the

[14] See footnote 13.

petition for review dismissed by a United States Court of Appeals; or

(4) upon the expiration of ten days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Board be affirmed or the petition for review dismissed.

PENALTIES

SEC. 15. (a) If there is in effect with respect to any organization or individual a final order of the Board requiring registration under section 7 or section 8 of this title—

(1) such organization shall, upon conviction of failure to register, to file any registration statement or annual report, or to keep records as required by section 7, be punished for each such offense by a fine of not more than $10,000, and

(2) each individual having a duty under subsection (h) of section 7 to register or to file any registration statement or annual report on behalf of such organization, and each individual having a duty to register under section 8, shall, upon conviction of failure to so register or to file any such registration statement or annual report, be punished for each such offense by a fine of not more than $10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

For the purposes of this subsection, each day of failure to register, whether on the part of the organization or any individual, shall constitute a separate offense.

(b) Any individual who, in a registration statement or annual report filed under section 7 or section 8, willfully makes any false statement or willfully omits to state any fact which is required to be stated or which is necessary to

make the statements made or information given not misleading, shall upon conviction thereof be punished for each such offense by a fine of not more than $10,000, or by imprisonment for not more than five years, or by both such fine and imprisonment. For the purposes of this subsection—

(1) each false statement wilfully made, and each willful omission to state any fact which is required to be stated, or which is necessary to make the statements made or information given not misleading, shall constitute a separate offense; and

(2) each listing of the name or address of any one individual shall be deemed to be a separate statement.

(c) Any organization which violates any provision of section 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000. Any individual who violates any provision of section 5, 6, or 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment.

APPLICABILITY OF ADMINISTRATIVE PROCEDURE ACT

SEC. 16. Nothing in this title shall be held to make the provisions of the Administrative Procedure Act inapplicable to the exercise of functions, or the conduct of proceedings, by the Board under this title.

EXISTING CRIMINAL STATUTES

SEC. 17. The foregoing provisions of this title shall be construed as being in addition to and not in modification of existing criminal statutes.

* * *

Immigration and Nationality Act

Pertinent provisions of sections 22 and 25 of the Subversive Activities Control Act have been carried forward in the Immigration and Nationality Act, 66 Stat. 163 adopted June 27, 1952, 8 U. S. C. secs. 1182, 1251, 1424, 1451, as follows:

SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * *

(28) Aliens who are, or at any time have been, members of any of the following classes:

* * *

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization.

SEC. 241. (a) Any alien in the United States (including any alien crewman) shall, upon the order of the Attorney General, be deported who—

* * *

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

* * *

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization.

SEC. 313. (a) Notwithstanding the provisions of section 405(b), no person shall hereafter be naturalized as a citizen of the United States—

* * *

(2) * * * (G) who, regardless of whether he is within any of the other provisions of this section, is a member of or affiliated with any Communist-action organization during the time it is registered or required to be registered under the provisions of section 7 of the Subversive Activities Control Act of 1950; or (H) who, regardless of whether he is within any of the other provisions of this section, is a member of or affiliated with any Communist-front organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such alien establishes that he did not have knowledge or reason to believe at the time he became a member of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required

to be registered have such knowledge or reason to believe) that such organization was a Communist-front organization.

SEC. 340. * * * (c) If a person who shall have been naturalized after the effective date of this Act [15] shall within five years next following such naturalization become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded such person from naturalization under the provisions of section 313, it shall be considered prima facie evidence that such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively.

Communist Control Act

The Communist Control Act of 1954, 68 Stat. 775, 50 U. S. C. 841-44, provides in part as follows:

FINDINGS OF FACT

SEC. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purport-

[15] The introductory clause of section 25(d) of the Subversive Activities Control Act read "If a person who shall have been naturalized after January 1, 1951 * * *."

edly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power render its existence a clear, present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their

revolutionary services. Therefore, the Communist Party should be outlawed.

PROSCRIBED ORGANIZATIONS

SEC. 3. The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are hereby terminated: *Provided, however,* That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended.

SEC. 4. Whoever knowingly and willfully becomes or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes or objectives the establishment, control, conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political subdivision thereof, by the use of force or violence, with knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a "Communist-action" organization.

(b) For the purpose of this section, the term "Communist Party" means the organization now known as the Communist Party of the United States of America, the

Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof.

SEC. 5. In determining membership or participation in the Communist Party, or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented, as to whether the accused person:

(1) Has been listed to his knowledge as a member in any book or any of the lists, records, correspondence, or any other document of the organization;

(2) Has made financial contribution to the organization in dues, assessments, loans, or in any other form;

(3) Has made himself subject to the discipline of the organization in any form whatsoever;

(4) Has executed orders, plans, or directives of any kind of the organization;

(5) Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the organization;

(6) Has conferred with officers or other members of the organization in behalf of any plan or enterprise of the organization;

(7) Has been accepted to his knowledge as an officer or member of the organization or as one to be called upon for services by other officers or members of the organization;

(8) Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans of the organization;

(9) Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization;

(10) Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization;

(11) Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the organization or to anyone else in behalf of the objectives of the organization;

(12) Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization;

(13) Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization;

(14) The enumeration of the above subjects of evidence on membership or participation in the Communist Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated.

* * * [16]

SEC. 12. If any provision of this title or the application thereof to any person or circumstances is held invalid, the remainder of the title, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

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[16] The omitted sections amend the Subversive Activities Control Act.

Social Security Act

The Social Security Act, as amended, provides in part as follows, 70 Stat. 824, 828, 839, 42 U. S. C. 410:

(a) The term "employment" means * * * any service, of whatever nature, performed after 1950 * * * (A) by a person for the employee employing him, irrespective of the residence or citizenship of either, (i) within the United States * * * except that, in the case of service performed after 1950, such term shall not include—

* * *

(17) Service in the employ of any organization which is performed (A) in any quarter during any part of which such organization is registered, or there is in effect a final order of the Subversive Activities Control Board requiring such organization to register, under the Internal Security Act of 1950, as amended, as a Communist-action organization, a Communist-front organization, or a Communist-infiltrated organization, and (B) after June 30, 1956.